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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-640

E. CODY LAIRD & JOANNE H. LAIRD, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

E. Cody Laird and Joanne H. Laird, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit entered in the above-entitled case on August 4, 1977.

OPINIONS BELOW

The opinion of United States Court of Appeals, Fifth Circuit is reported at 556 F.2d 1224 and is printed in Appendix A hereto beginning at page 1a. The judgment of the United States Court of Appeals, Fifth Circuit is printed in Appendix A at page 37a. The opinion of the United States District Court for the

Northern District of Georgia is reported at 391 F. Supp. 656 and is printed in Appendix A beginning at page 39a. The judgment of the United States District Court for the Northern District of Georgia is printed in Appendix A at page 38a.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit was entered on August 4, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether a taxpayer who has on economically realistic terms purchased for use in his business certain rights of ascertainable value in a revenue-producing contract expiring by its own terms in four years and which does not include any renewal options should be precluded from depreciating his investment under 26 U.S.C. § 167 merely because the taxpayer is likely to enter into a similar revenue-producing contract when the four-year contract expires.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the following statutory and regulatory provisions:

15 U.S.C. § 1291:

> The antitrust laws as defined in § 12 of this Title or in the Federal Trade Commission Act, as amended, shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any

> league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501(c)(6) of Title 26, combine their operations in an expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

26 U.S.C. 167(a):

> There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—(1) of property used in the trade or business, or (2)of property held for the production of income

Treasury Regulation § 1.167(a)-3:

> If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation.

STATEMENT OF THE CASE

This action to recover income taxes, interest and costs was filed by E. Cody Laird, Jr. and Joanne H. Laird on February 22, 1973 pursuant to 28 U.S.C. § 1346(a)(1). In 1967 and 1968, the Lairds were stockholders in The Five Smiths, Inc., a subchapter S corporation formed in 1966 under 26 U.S.C. §§ 1371-79 to acquire, own and operate the new Atlanta Falcons football team in the National Football League. As stockholders, petitioners were entitled to a distributable share of any losses suffered by The Five Smiths for its fiscal years ending on January 31 of 1967 and 1968.

After auditing the income tax returns filed by The Five Smiths, Inc. for 1967 and 1968, the Internal Revenue Service disallowed certain depreciation deductions. As a result of the disallowances, the Internal Revenue Service proposed deficiencies in the income taxes due from plaintiffs in the amounts of $21,063.73 for 1967 and $27,155.26 for the year 1968. Plaintiffs paid the proposed deficiencies, pursued their administrative remedies, and filed this action seeking a refund from the United States of America for $48,218.99, plus statutory interest and the costs of this suit.

A. Facts Relevant To Petition For Certiorari Review:

Prior to 1961, the owners of teams in the National Football League ("NFL") negotiated individually with the three existing television networks for the licensing and sale of the telecasting rights to their NFL games. The amount of money a team earned depended on the nature of its regional television market. (Joint App. 225-226, 599-600).[1]

[1] All record references are to the Joint Appendix filed in the Fifth Circuit in this case, which shall be identified as "Joint App."

In 1961, Congress enacted 15 U.S.C. § 1291 exempting from the federal antitrust laws all agreements by professional sports team owners jointly licensing or selling their broadcast rights to television networks.

Subsequent to the enactment of 15 U.S.C. § 1291, the NFL entered into a two-year joint television agreement for the 1962 and 1963 seasons with the Columbia Broadcasting System ("CBS"). A separate two-year agreement was negotiated in 1963 for the 1964 and 1965 seasons. (Joint App. 1123).

In early 1965, NFL Commissioner Alvin M. (Pete) Rozelle began negotiations with CBS on behalf of the 14 NFL team owners for a new multi-year contract. Later in 1965, while the CBS-NFL negotiations were still in progress, Rozelle opened discussions with Rankin Smith, principal shareholder in The Five Smiths, Inc., concerning the location of a new NFL franchise in Atlanta, Georgia. (Joint App. 581-603).

Rozelle advised Smith that he expected to obtain a four-year contract with CBS, and that for the four-year period the contract would produce revenues for each of the existing 14 teams in the NFL in excess of 1 million dollars per year. Smith conditioned his willingness to acquire an NFL franchise on the team owners' willingness to sell him a pro rata interest in the four-year television agreement. (Joint App. 581-603).

In December of 1965, Rozelle, acting pursuant to 15 U.S.C. § 1291 and on behalf of the owners of all 14 NFL teams, concluded his negotiations with CBS by entering into a four-year contract for the broadcast of all regular season NFL games. Each of the teams belonging to the NFL at that time was assured annual television income in excess of 1 million dollars for the

four-year term of the CBS contract. (Joint App. 66, ¶ 19, ¶ 20). The Five Smiths, Inc. had not yet joined the league and was not a party to the contract. (Joint App. 63, ¶ 12; Joint App. 64, ¶ 15(a)).

The CBS agreement for the 1966-69 seasons did not include any renewal options. (Joint App. 1093-1122). At the conclusion of the four-year term, CBS was free to enter into a telecasting agreement with any other football league or football teams. Similarly, the members of the NFL were free to seek a joint licensing or sale agreement with another network, or to attempt to market their television rights on an individual rather than a joint basis.

On February 14, 1966, approximately three months after the CBS television contract had been finalized, The Five Smiths, Inc. entered into an agreement (the "Atlanta Agreement") whereby the corporation (1) became a franchised member of the NFL; (2) purchased 42 veteran player contracts from all other NFL teams; and (3) acquired a pro rata share with all other NFL member clubs in any joint television contracts for the year 1966 and thereafter.[2] (Joint App. 63, ¶ 12). Specifically, paragraph VIII(f) of the agreement provided as follows (Joint App. 87):

> "Smith shall be entitled to participate equally with all other member clubs in any Single Network television contract(s) hereafter executed by the League for the year 1966 and thereafter during the time the Atlanta Club continues as a member of the League."

[2] Commissioner Rozelle and Rankin Smith signed a preliminary letter of understanding on June 29, 1965 memorializing most of the conditions to be met by the respective parties prior to execution of the Atlanta Agreement. By February, 1966 those conditions had been satisfied.

As interpreted by the parties, the February 14, 1966 agreement sold The Five Smiths, Inc. the right to an equal share in the proceeds of the four-year CBS contract previously executed in December, 1965. As interpreted by the government and by the Fifth Circuit Court of Appeals, the agreement also conveyed to Five Smiths the right to participate in joint television contracts executed in later years for as long as Atlanta remained in the NFL, if the members of the NFL entered into any such joint agreements.

It is undisputed that by virtue of paragraph VIII (f), the 14 NFL team owners sold and The Five Smiths, Inc. acquired the right to receive the following minimum amounts of income from CBS during the years designated:

	Minimum Amount Guaranteed
1966	$1,248,000
1967	$1,220,625
1968	$1,142,500
1969	$1,126,875

It is also undisputed that the CBS contract expired in accord with its own terms in 1969.

As required by the February 14, 1966 agreement, The Five Smiths, Inc. paid the NFL 50,000 dollars as a franchise fee, and paid the 14 team owners the sum of 8,450,000 dollars and two cents in five annual installments.[3]

[3] Of the $8,500,000.02 purchase price, $727,086 constituted deferred interest the deduction of which was accepted by the Internal Revenue Service and is not at issue in this litigation.

B. The Rulings Below:

At trial, petitioners contended that The Five Smiths, Inc. had acquired depreciable assets having a value of approximately 7.7 million dollars pursuant to the February 14, 1966 agreement. Petitioners further contended that the 42 player contracts and the participation rights acquired from the other owners in the 1966-69 CBS television agreement were amortizable.

The government argued that under the terms of the 1966 agreement, depreciable and non-depreciable rights were inseparably intertwined, and that accordingly petitioners were not entitled to depreciate any of the assets. Further, the government insisted that the useful life of the participation rights in the four-year CBS contract could not be determined by the fixed term of the contract because of the probability that the NFL owners would negotiate similar television contracts in the future.

The trial judge rejected the government's inseparability argument and found the player contracts depreciable with a value of 3.035 million dollars and an average useful life of 5.25 years. The trial court also found that the rights acquired by The Five Smiths in the 1966-69 television contract were worth 4.27 million dollars but that the rights had no determinable useful life, and consequently were not depreciable.

Petitioners appealed the trial court's ruling with respect to the four-year television contract. The government appealed the trial court's finding that the player contracts were depreciable and had a value of 3.035 million dollars.

On appeal, the petitioners contended, *inter alia,* that even if paragraph VIII(f) of the Atlanta Agreement

gave The Five Smiths interests both in the pre-existing four-year 1965 CBS agreement and in any non-depreciable future income which might be earned by the so-called "league television pool", the two interests were plainly separable for tax purposes, and the value of the CBS television contract was depreciable over its four-year life. Petitioners conceded that the possibility of earning future television income after the 1969 season would not be depreciable.

On August 4, 1977, the Court of Appeals affirmed the trial court's judgment. Specifically, the court sustained the trial court's valuation of the player contracts at 3.035 million dollars, and also affirmed that the total value of all the assets acquired by The Five Smiths in the Atlanta Agreement was 7.7 million dollars.

The Fifth Circuit explicitly declined to value the CBS televison rights. 556 F.2d at 1236-37 (p. 24a, *infra*). Apparently, however, the court did not doubt that they were capable of valuation; the opinion observes as follows (556 F.2d at 1233) (p. 17a, *infra*):

> "If the taxpayers could prove that the [CBS contract] television rights also had a limited useful life, the mass asset rule likewise would not bar a depreciation deduction for those rights." (Bracketed material added).

Despite the fact that the 1965 CBS contract had an ascertainable value established by the District Court and never repudiated by the Court of Appeals, and despite the fact that the CBS agreement had a fixed term with no renewal options or provisions, the Fifth Circuit concluded that the contract was merely a "four-

year link" in a "perpetual chain" of television income. 556 F.2d at 1236 (p. 24a, *infra*). Commenting that "televised NFL football is by now a national tradition" and that the telecasting rights acquired by The Five Smiths in the Atlanta Agreement "will have substantial value as long as there remains an NFL and a television set in every living room," the court refused to find any separate useful life for the four-year CBS agreement. 556 F.2d at 1236-37 (p. 25a, *infra*).

REASONS FOR GRANTING WRIT

This is not a case where the taxpayers petitioning for certiorari review merely disagree with the evaluation made by the Court of Appeals of the facts in the record. The decision by the appellate court denying the amortizability of the rights acquired by The Five Smiths, Inc. in the four-year CBS television contract executed in December, 1965 flatly contradicts basic principles of tax law previously recognized by the Fifth Circuit itself, as well as by other circuits. The decision elevates form over substance, ignores the basic test of economic reality by which the taxable effect of all transactions is to be measured, and creates contradiction and confusion in a critical area of business planning where the law previously had assured reasonably predictable consistency.

Petitioners do not here contest the Fifth Circuit's construction of the language of paragraph VIII(f) of the February, 1966 agreement. Judicial construction of contractual language is always *ad hoc*; even where plainly in error, such a decision cannot give rise to fundamental legal questions of broad significance to other taxpayers. Accordingly, this petition assumes

the correctness of the Fifth Circuit's decision that paragraph VIII(f) conveyed to The Five Smiths, Inc. a share in whatever rights in future joint television contracts the league members might thereafter acquire, as well as a share in the existing four-year CBS contract.

A. Relevant Principles of Law As Declared by Other Circuit Courts of Appeals, by the Court of Claims and by the Fifth Circuit:

Taxpayers frequently acquire different intangible assets in the same transaction for a lump sum price under circumstances where the assets are similar in nature or functionally interrelated. Some of the intangible assets acquired may be nondepreciable by nature. An example would be the good will of a going business. That the assets are functionally interrelated and were not separately bargained for may impose on the taxpayer the burden of separating the depreciable from the nondepreciable assets. The several circuits and the Court of Claims have developed rules of law governing whether a specific intangible asset can be separated for tax purposes from nondepreciable intangibles acquired in the same transaction. Among the rules relevant to this litigation are the following:

(1) The intangible asset with respect to which depreciation is sought must have significant and identifiable value, and its useful life must be determinable. See, e.g. *Richard S. Miller & Sons, Inc.* v. *United States,* 537 F.2d 446 (Ct. Cl. 1976); *KFOX Inc.* v. *United States,* 510 F.2d 1365 (Ct. Cl. 1975); *Houston Chronicle Publishing Co.* v. *United States,* 481 F.2d 1240 (1973), *cert. denied,* 414 US 1129, 94 S.Ct. 867 (1974).

(2) Where the intangible asset consists of an interest acquired in certain contractual rights, and where the contract has a fixed term, that term will normally constitute the useful life of the assets. See, e.g., *Birmingham News Co.* v. *Patterson,* 345 F.2d 531 (5th Cir. 1965) affirming *per curiam* 224 F.Supp. 670 (N.D. Ala. 1963); *David Hoffman,* 48 T.C. 176 (acq. appeal dism'd nolle pros per stipulation, 2d Cir. 1967); *Bonwit Teller & Co.* v. *CIR,* 53 F.2d 381 (2d Cir. 1931) (Case 2).

(3) To prove an exception to the general rule that the fixed term of a contract will measure its useful life, two facts must be conjunctively established:

First, the contract either must explicitly provide for automatic or unilateral renewal by the taxpayer on favorable terms for an indefinite period beyond its stated duration (see, e.g., *Commissioner of Internal Revenue* v. *Indiana Broadcasting Corporation,* 350 F.2d 580 (7th Cir. 1965), or the custom of the trade must establish unequivocally that such contracts are automatically renewed without further negotiation or expense to the taxpayer (see, e.g., *Gant* v. *Commissioner of Internal Revenue,* 263 F.2d 558 (6th Cir. 1959)).

Second, analysis of the transaction wherein the taxpayer acquired the fixed-term contractual rights must confirm that measured by the standard of economic reality, the taxpayer paid far too great a price for the limited rights he is seeking to amortize; accordingly, it is reasonable to conclude that he in fact paid not for the value of the rights measured by the fixed term of the contract, but rather for the substantially greater value of the rights to be provided by unlimited renew-

als of the contract. See, e.g., the *Indiana Broadcasting* and *Gant* cases, *supra.*

A similar line of cases defining the limited exception arises from the acquisition of renewable license rights. If the evidence demonstrates that the taxpayer paid an unrealistically high price for the limited license term remaining, and that such licenses were generally renewed as a matter of routine and without further substantial expense to the license holder, the courts conclude that measured by the test of economic reality, the taxpayer was paying not for the fixed term of the license, but rather for the expectation that his license rights would continue indefintely into the future at little additional expense. See, e.g., *Westinghouse Broadcasting Co.* v. *Commissioner,* 309 F.2d 279 (3rd Cir. 1962), affirming 36 T.C. 912 (1961), *cert. denied,* 377 U.S. 935, 83 S.Ct. 88 (1963); *Nachman* v. *Commissioner,* 191 F.2d 934 (5th Cir. 1951).

These exceptions to the general rule that the term of a contract defines its useful life for tax purposes are clear, limited and well-grounded in policy. They serve the most basic objective of assuring that the tax consequences of any transaction will be based neither on form nor on speculative conjecture, but rather on the perceptible economic reality of the transaction. See, e.g., *Commissioner* v. *Court Holding Co.,* 324 US 331, 65 S.Ct. 707 (1945); *Wilson Athletic Goods Mfg. Co.* v. *Commissioner,* 222 F.2d 355, 357 (7th Cir. 1955); *Hamlin's Trust* v. *Commissioner,* 209 F.2d 761, 764 (10th Cir. 1954). The rule and the exceptions provide reasonable guidelines for predicting the tax consequences of a transaction.

The Fifth Circuit's decision in *Laird* v. *United States* violates the rule and ignores its exceptions.

B. Laird v. United States: The Court's Fundamental Error:

The Fifth Circuit confirmed the trial court's findings of fact that the total package of assets acquired by The Five Smiths had a value of 7.7 million dollars, and that the player contracts had a value of 3.035 million dollars. Accordingly, all the other assets acquired had a value of approximately 4.7 million dollars.

The other assets fell into two categories: (1) franchise rights and (2) television rights. The franchise rights were admittedly non-depreciable.

The television rights conveyed by paragraph VIII(f) of the Atlanta Agreement included a share in any joint television contracts to which the 14 NFL owners were parties. The only such contract then in existence was the 1965 CBS contract to expire in four years. Thus the television rights acquired fell into two categories: (1) The Five Smiths' share in rights already in existence as defined and limited by the CBS contract; and (2) The Five Smiths' right to share in any future contracts into which the 14 team owners might enter. The right to share in future contracts not yet in existence clearly was non-depreciable.

Thus the Fifth Circuit was confronted with a transaction, or part of a transaction, wherein the taxpayer had acquired for 4.7 million dollars two assets which were non-depreciable and the four-year CBS contract which, if acquired alone, clearly would have been depreciable. The issue, then, was whether the four-year contract could be separated from the non-depreciable assets in accord with the principles of law controlling such determinations. See Section A, *supra*.

The trial court found that the CBS agreement had a definite ascertainable value of 4.27 million dollars. See Statement of the Case, United States District Court for the Northern District of Georgia, Atlanta, Division, Finding of Fact No. 17, 391 F. Supp. at 664 (p. 53a, *infra*). The valuation was arrived at by discounting to present value the stream of income to be produced for The Five Smiths, Inc. by the CBS contract during its four year duration. The Court of Appeals did not reject this valuation figure, but rather regarded any decision with respect to the value of the CBS contract unnecessary in view of its conclusion that the contract had no useful life. 556 F.2d at 1236-37 (p. 24a, *infra*).

The court refused to accept the four-year contractual term of the contract as its useful life because it found the contract "inseparable" from the future television rights not yet in existence and also acquired pursuant to paragraph VIII(f). The explanation in the opinion was circular and unenlightening. In essence, the court said that the CBS contract was inseparable because it had no determinable useful life, and that it had no useful life because it was inseparable.

At page 1237 of the reported opinion, the court observed as follows (pps. 24a-25a, *infra*):

> "Although the CBS contract provided a measure of the value of Five Smith's television rights, the source of those rights was the Atlanta agreement. Indeed, the CBS contract preceded the entry into the League of the Atlanta Club. Five Smiths' right to share in the revenue from network television contracts is indefinite in duration. . . ."

These remarks evidence the court's erroneous assumption that the useful life of any interest in the four-year CBS contract claimed by Five Smiths had to be established by the explicit provisions of the Atlanta Agreement. That is not the law. The useful life of the CBS agreement was determined by its own provisions, not by the provisions of the Atlanta Agreement. The form of the Atlanta Agreement cannot control the economic substance of the underlying transaction. See, e.g. *Commissioner* v. *Court Holding Co.*, 324 U.S. 331, 334 (1945). Certainly neither the court nor the Internal Revenue Service would have considered themselves bound by any useful life agreement negotiated in the Atlanta Agreement. See, e.g., *Higgins* v. *Smith*, 308 U.S. 473, 477-78 (1940).

The rationale for the court's unwillingness to find a useful life for the interest acquired in the CBS contract is best expressed by its findings that "televised NFL football is by now a national tradition," and that the television rights "will have substantial value as long as there remains an NFL and a television set in every living room." 556 F.2d at 1237 (p. 25a, *infra*).

These hindsight observations as to the state of the professional football business in 1977 (and subsequent to the AFL-NFL merger) are irrelevant to the question whether on February 14, 1966 the 1965 CBS contract was a wasting asset exhausting itself over a four-year period. See, e.g., *Westinghouse Broadcasting Co.* v. *Commissioner*, 36 T.C. 912 (1961), aff'd 309 F.2d 279 (3rd Cir. 1962). Regardless of the value inhering today in the "future rights" acquired by The Five Smiths in 1966, the fact remains that the CBS four-year agreement was being exhausted as it was used in The Five Smith's business.

In *Bonwit Teller & Co.* v. *Commissioner*, 53 F.2d 381 (2d Cir. 1931), the Court of Appeals for the Second Circuit reversed the Board of Tax Appeals' decision that the existence of a written option to renew a 21-year leasehold interest for an additional 21-year period effectively extended the useful life of the original leasehold from 21 to 42 years. Holding that the Board of Tax Appeals erred in extending the period, *id* at 383, the court noted that regardless of the option to renew,

> "it is still true that the property being used in the business (the leasehold) will be exhausted in 19 years. If the option should be exercised at the end of the existing term, there will be created a new term (new property) to be thereafter used in the business."

In the *Laird* case, of course, the CBS contract did not even contain a renewal option. The Fifth Circuit nevertheless declared the terms of that contract "uncertain" not because of any provision in the CBS agreement enabling either party to continue the contract, but merely because in the court's view eleven years after the fact, CBS and the NFL "probably" were going to find a new contract for seasons subsequent to 1969 mutually beneficial.

Such reasoning places taxpayers at the mercy of largely subjective speculation engaged in years after the transaction by premising the tax consequences of the transaction on a judge's guess as to whether the parties to a contract will want to continue doing business together when the contract has expired.

Prior to the *Laird* decision, the Fifth Circuit was in conformity with the other circuits in recognizing that the fixed term of a contract normally determines its

useful life for tax purposes. For example, in *Birmingham News Co.* v. *Patterson,* 345 F.2d 531 (5th Cir. 1965), affirming *per curiam* 224 F. Supp. 670 (N.D. Ala. 1963), the Internal Revenue Service contended that explicit provisions automatically renewing a 30-year fixed term agency contract should prevent the taxpayer from using the fixed term as the useful life of the contract rights. The court admitted that the parties might choose to continue the agency contract beyond its fixed term because of mutual benefit, but nevertheless held that the contract was for a definite and fixed period of time. The court emphasized that the price paid for 30-year agreement was economically realistic. See also *Commissioner* v. *Van De Steeg,* 60 T.C. 17 (1973), aff'd *per curiam,* 510 F.2d 961 (9th Cir. 1975).

The *Bonwit Teller, Birmingham News* and *Van De Steeg* cases, *supra,* share a harmonizing principle with the *Westinghouse, Nachman,* and *Indiana Broadcasting* cases discussed in Section A above. The fact that a fixed term contract may be renewed according to its own explicit provisions does not extend the useful life of the contract beyond its stated term unless the economic substance of the transaction confirms that the taxpayer paid far more for the asset than the fixed term of the contract was worth.

In this case, the Fifth Circuit has totally abandoned that controlling principle. As noted above, the court found that the total package of assets was worth 7.7 million dollars, and that the player contracts were worth approximately 3 million dollars. It is clear, then, that the remaining assets purchased in the transaction, i.e., the franchise rights and the existing and future television rights, could not have been worth more than

4.7 million dollars. The interest acquired in the CBS television contract had a present cash value of 4.27 million dollars, as found by the trial court and as established unequivocally by the record. Consequently, whatever rights The Five Smiths acquired other than their interest in the CBS contract could not have been worth more than the difference between 4.7 million dollars and 4.27 million dollars. These parameters are established by the Circuit's own opinion and by the record.

These values are the economic reality of the transaction at issue. It is clear that neither The Five Smiths, Inc. nor the NFL owners attributed substantial value to whatever future television rights were acquired in addition to the four-year CBS agreement. The economic substance of the transaction confirms that the probability of renewal of the television contract or of obtaining new television contract rights in the future played a relatively insignificant part in determining the value of the intangible television rights acquired by The Five Smiths. By contrast, see *Nachman* v. *Commissioner,* 191 F.2d 934 (5th Cir. 1951), where the taxpayer ostensibly paid $8,000 for a liquor license which was to expire almost immediately. The evidence indicated that such liquor licenses were normally renewed as a matter of course, and the economic substance of the transaction confirmed that the price the taxpayer paid reflected his anticipation that the license had a valuable life considerably beyond its expiration date.

Petitioners do not quarrel with the facts found by the Court of Appeals. Those very facts illustrate that the Fifth Circuit, wittingly or otherwise, has in this decision abandoned the economic reality test generally recognized by the Circuit Courts, the Court of Claims,

and previously by the Fifth Circuit itself as the controlling criterion in determining whether a possibility of renewal prevents the fixed term of a contract from refining its useful life.

The Court of Appeals' decision in this case creates not merely new law, nor merely bad law. It creates law adversely affecting broad classes of people and fundamental principles of the law of taxation.

As noted by the Fifth Circuit in its opinion, the *Laird* action is a Justice Department test case for the professional sports industry. 556 F.2d at 1226, n.1 (p. 2a, n.1, *infra*). Administrative proceedings and litigation in different circuits throughout the country involving these same issues have been suspended pending the resolution of this case. A decision by the Supreme Court on one of the most basic principles to be applied in the cases would be of significant benefit.

The principles at issue affect every acquisition of intangible rights. The buying and selling of going businesses, including their intangible assets, is a fundamental element of our national economy. The tax consequences of such an acquisition often determine whether the acquisition will take place and play a material role in determining the price to be paid. The Fifth Circuit's abandonment of the economic reality test in determining the useful life of fixed term contractual rights acquired in such transactions substitutes chaos for rational predictability.

The essential message of the *Laird* decision is that even where economic reality confirms that the taxpayer purchased contractual rights having value only for a limited period of time, courts will be free to disregard

economic reality if the courts, with the benefit of many years' hindsight, perceive that the taxpayer will have sufficient economic power to renew or obtain equally favorable contractual terms from someone when the contract acquired expires. This irrational rule conditions amortizability not on proof of value or useful life, but rather on judicial forecasts of the taxpayer's market power at the time the useful life of the asset in question expires. In essence, such a rule punishes success. Any rule of law which conditions amortizability not on the economic substance of the transaction at issue, but rather on predictions as to the success or failure of the taxpayer's business enterprise at the time the assets' useful life expires serves no legitimate tax or other objective.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

HAROLD E. ABRAMS †
A. STEPHENS CLAY

Counsel for Petitioners
E. Cody Laird and
Joanne H. Laird

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† Mr. Abrams is a member of the Bar of the Supreme Court of the United States and will serve as attorney of record.

APPENDIX

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

E. Cody LAIRD and Joanne H. Laird
Appellee Cross-Appellees,

v.

UNITED STATES of America,
Defendant-Appellee Cross-Appellant.

No. 75-2113.

Aug. 4, 1977.

Harold E. Abrams, A. Stephens Clay, Emmet J. Bondurant, Atlanta, Ga., for plaintiffs-appellants cross-appellees.

John W. Stokes, Jr., U. S. Atty., William D. Mallard, Jr., Asst. U. S. Atty., Atlanta, Ga., Scott P. Crampton, Asst. Atty. Gen., Tax Div., Alfred S. Lombardi, Atty., Gilbert E. Andrews, Acting Chief, Appellate Section, Dept. of Justice, Washington, D. C., for defendant-appellee cross-appellant.

Appeals from the United States District Court for the Northern District of Georgia.

Before BROWN, *Chief Judge,* AINSWORTH, *Circuit Judge,* and JAMESON *, *District Judge.*

AINSWORTH, *Circuit Judge:*

This suit for refund of federal income taxes involves the tax treatment of the purchase of the Atlanta Falcons professional football team franchise and the assets necessary to establish, field and operate the team. It arises out of the 1966 agreement between The Five Smiths, Inc.

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* Senior District Judge of the District of Montana, sitting by designation.

(Five Smiths) and the National Football League (NFL) in which, for $8.5 million, Five Smiths bought an NFL professional football franchise for Atlanta, together with the contracts for the services of forty-two veteran football players and other intangible assets.[1]

The questions before us involve the amortization of intangible assets under the Internal Revenue Code by the purchaser. Three issues are presented: (1) whether intangible assets acquired by Five Smiths in this transaction are subject to an allowance for depreciation under 26 U.S.C. § 167(a), where such assets were purchased in a bundle of interrelated intangibles; (2) whether the purchaser is entitled to amortize, and thus to claim a depreciation deduction for its right to share ratably in the revenues produced by a four-year contract between the NFL teams and the CBS Television Network for the televising of NFL games; and (3) assuming the purchaser is entitled to an allowance for depreciation of the players' contracts which it received in the 1966 deal, whether the district court's valuation of those contracts was correct.

We hold that the depreciation allowance applicable to intangible assets is not lost when such assets are purchased in a bundle of interrelated assets. Furthermore, we hold that, though the purchaser is not entitled to an amortization deduction for its rights in the television contract with CBS, the purchaser is entitled to amortize the value of the players' contracts in the amount determined by the district court. The decision of the district court is affirmed, but for

[1] Pursuant to the court's request at oral argument, the United States made inquiry of the Internal Revenue Service and learned that there are pending similar tax cases, in addition to that of the Atlanta Falcons, involving the issue of sport franchises. The other matters are concerned with the Kansas City Royals (baseball), the Miami Dolphins (football), the Seattle Supersonics (basketball), the Philadelphia Flyers (hockey), and the Kansas City Athletics (baseball).

reasons which differ somewhat from those expressed by the trial judge.

I.

A. Preliminary Statement of the Case.

Five Smiths paid the NFL and its member teams $8,500,000.02 for the franchise and the other assets acquired in the transaction. Five Smiths, a Georgia corporation set up to operate the professional football team in Atlanta, elected to be taxed in the taxable years involved as a Subchapter S small business corporation, pursuant to 26 U.S.C. §§ 1371-79, for its taxable years ending January 31, 1967 and January 31, 1968. Therefore, the corporation's tax consequences were passed on to the individual shareholders. Rankin M. Smith is the owner of 64% of the shares of Five Smiths, and plaintiff taxpayer E. Cody Laird, Jr. owns 6% of the common stock.[2] On its tax returns for the taxable years ending January 31, 1967 and January 31, 1968, the years involved in this case, Five Smiths applied the purchase price of $8.5 million in the following manner: $727,086 was deducted from the purchase price as deferred interest, $50,000 was set up as the nondepreciable cost of the NFL franchise, and the remaining $7,722,014.04 was shown as the cost of the players' contracts, with estimated useful life of 5.25 years. Accordingly, amortization deductions of $1,471,031.24 for the players' contracts were taken by the corporation in each of the two tax years involved.

The corporation reported losses of $506,329 in 1967 and $581,047 in 1968, and plaintiffs, accordingly, reported on their personal income tax returns their proportionate share of the corporation's losses, $30,380 for 1967 and $34,638 for 1968.

[2] Laird's wife, Joanne, the other plaintiff in this action, filed joint tax returns with her husband for the years in question.

The Internal Revenue Service (IRS) accepted Five Smiths' treatment of the $50,000 cost of the franchise and the $727,086 deferred interest deduction, but determined that only $1,050,000 should be allocated to the depreciable asset "player contracts and options," amortized over the 5.25-year useful life. The remaining $6,722,914 of the purchase price was allocated by the IRS to the nondepreciable cost of the franchise. Therefore, the $1,471,031.24 depreciation deductions claimed by Five Smiths in each of the tax years were disallowed to the extent of $1,271,031.24. As a consequence thereof, Five Smiths was shown to have taxable income rather than loss for the years in question, and plaintiffs Lairds' proportionate share of the corporation's claimed losses was disallowed. This resulted in the underpayment by plaintiffs of $48,218.99 for the taxable years 1967 and 1968 which is the amount sought in this refund suit, the tax deficiency having been first paid.

B. The Pertinent Facts

Five Smiths' entry into the game came at a time of competition and expansion in professional football. The NFL and its rival, the American Football League, were competing for available talent during the mid-1960's and, as the district court pointed out, the so-called "war" between the leagues drove up the cost to team owners of players and other assets. In 1965, both leagues were interested in expanding their respective organizations by selling a new team franchise for operation in Atlanta by 1966. Both contacted potential franchise owners, one of whom—approached by the NFL—was Rankin M. Smith, the successful majority-interest purchaser herein. At that time, entrance into the NFL required the approval of twelve of the (then) fourteen member clubs, and an agreement to be bound by all League rules and regulations, to pay all League assessments, and to pay a $50,000 membership fee.

A June 29, 1965 letter of understanding from NFL Commissioner Pete Rozelle to Rankin M. Smith,[3] which was

[3] Following is the text in full of the letter:

29 June 1965

Mr. Rankin M. Smith
Life Insurance Company of Georgia
573 West Peachtree Street, N.E.
Atlanta, Georgia 30308

Dear Mr. Smith:

This shall confirm the understanding between the National Football League (hereinafter referred to as "National") and Rankin M. Smith (hereinafter referred to as "Smith") to the effect that National has granted a franchise in said league to Smith to be operated in Atlanta, Georgia, commencing with the 1966 football season subject to the following terms and conditions:

1. Smith agrees to pay the sum of fifty thousand dollars ($50,000) for said franchise; $25,000 of said amount shall be paid on or before July 10, 1965, and the balance upon the obtaining of a satisfactory lease on the Atlanta stadium as herein set out.

2. Smith further agrees to pay to the member clubs of National the sum of $8,450,000 for the purchase of players owned by the member clubs of National to be assigned and transferred to Smith as hereinafter set out. Said sum of $8,450,000 shall be paid to the Commissioner of National as trustee for the member clubs in the following manner: 25% on but not before August 15, 1966, and the balance in four equal annual installments on the 15th day of each August thereafter until fully paid.

3. Each member club shall sell Atlanta following the close of the 1965 season three veteran members of its active list then under contract. The identity of such players and the method of selection shall be pursuant to a formula hereafter adopted by the member clubs at the 1966 annual meeting of National. Under such formula each club may withhold a fixed number of players free from selection and shall make the balance of its active list available for selection to Smith. Smith shall not be entitled to select more than three players per club.

4. This agreement by Smith is contingent upon Smith being able to obtain a satisfactory lease for the use of the Atlanta

designated as a binding memorandum agreement, included, importantly, the essential elements of the deal, as follows:

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stadium permitting Smith to operate a National Football League franchise in Atlanta and to use aid stadium upon terms satisfactory to Smith for a minimum period of ten years commencing in 1966; such lease to be awarded on or before the 6th day of July 1965.

5. When the lease shall have been acquired and Smith admitted as a member of National, Smith shall receive the following:

A. A franchise for Atlanta in National.

B. Smith shall be entitled to participate in the 1965 selection meeting of National and shall be awarded the first choice in the first twenty rounds thereof and an extra choice at the end of each of the first five rounds.

C. Smith shall receive one-fifteenth of any sum paid by any network for any single network television contract commencing in 1966 and a pro rata share each year thereafter while Atlanta holds a franchise.

6. The selection of management and coaches shall be subject to the prior approval of the Commissioner of National. Similarly, any other persons other than Smith who shall own a share in said club shall be subject to approval by the member clubs of National. In no event shall Smith personally own less than fifty-one percent of said franchise.

7. In addition thereto Smith shall personally guarantee all financial obligations hereinabove set out.

8. If a sixteenth franchise is granted, Smith shall not participate in any share of any monies paid for such new franchise granted by National.

9. The entity to operate the franchise and the persons owning any interest therein shall be subject to and bound by the Constitution and By-Laws of the National Football League.

This letter shall constitute a memorandum agreement and be binding upon National and Smith. Upon its execution and upon the procurement of a lease on the stadium hereinabove referred to, a more formal document shall be prepared and executed setting forth in detail the terms thereof.

1. The League granted Rankin M. Smith an NFL franchise in Atlanta, commencing with the 1966 football season, for which Smith was to pay $50,000;[4]

2. Smith agreed to pay the NFL member clubs $8,450,000 over five years for the purchase of players owned by those teams. After the 1965 season, each member club would sell Atlanta three of that club's veteran players who were under contract and were on the club's active list. The letter agreement provided that the selection of those players, in what ultimately was to be the so-called "expansion draft," would take place according to a formula to be subsequently developed by the member clubs;

3. Smith was to have the right to participate in the 1965 college draft and to have a large number of preferential draft choices therein;

4. Smith was to receive "one fifteenth of any sum paid by any network for any single network television contract commencing in 1966 and a pro rata share each year thereafter while Atlanta holds a franchise."

If this letter meets with your approval, kindly affix your signature on a duplicate copy thereof at the place indicated and the same shall constitute a binding agreement between us.

Very truly yours,

THE NATIONAL FOOTBALL LEAGUE

(s) BY: Pete Rozelle

Pete Rozelle, Commissioner

I have read the foregoing, consent thereto, and agree to be be bound thereby.

(s) Rankin M. Smith

Rankin M. Smith

[4] The NFL Constitution and By-Laws applicable during 1966 established a price of $50,000 for an NFL franchise.

Five Smiths was incorporated in August 1965. The new corporation participated in the college draft for rookie players that November, and was granted draft-choice privileges. On February 14, 1966, after Five Smiths had obtained a lease on the Atlanta stadium, the member teams of the NFL authorized Commissioner Rozelle to execute a formal agreement with Five Smiths for the consummation of the Atlanta deal. The member teams and Five Smiths also reached agreement on a formula for the expansion draft, in which Atlanta was to acquire the forty-two veteran players from the other teams.[5] Those players who were so acquired had a total of 149 years of prior NFL experience. At the start of the 1966 season, twenty-five of them were on Atlanta's active roster, and all of those played at least occasionally during the season.[6]

The television rights acquired under the February 14, 1966 agreement specified in article VIII, paragraph (f), in terms similar to the previously-quoted provision of the June 29, 1965 letter of understanding, that Smith would participate equally with the other NFL clubs in "any Single Network television contract(s) hereafter executed by the League for the year 1966 and thereafter during the time the Atlanta Club continues as a member of the League." This provision must be considered in the context in which it was written. Television rights were owned by the member teams individually, rather than by the League; however, pursuant to a partial statutory exemption for

[5] Under the expansion draft, each team made players available who were under contract to the selling team and were on that team's active or injured reserve lists. The formula in the February 14 agreement enabled the selling teams to "freeze," or protect, certain of their players, and Five Smiths to select three players from each selling team's remaining pool of players.

[6] Before entering the expansion draft, five Smiths also signed contracts with approximately fifty other players, who were either free agents or were rookies acquired in the college draft.

professional sports leagues from the antitrust laws,[7] which exemption pertains to the telecasting of games, the member teams in the NFL bargained collectively for the sale of television rights. In December 1965, Commissioner Rozelle agreed to a television contract with the CBS Television Network, pursuant to which CBS received the right to televise NFL games during the years 1966 through 1969 and, in exchange, agreed to pay the NFL's members the following total amounts for all teams during the four-year term of the contract:

Year	Amount
1966	$ 18,800,000
1967	20,050,000
1968	20,300,000
1969	20,050,000

Television revenues were an important element of team income for all clubs, and were crucial to Five Smiths. Before the June 29, 1965 letter of understanding was even executed, counsel for Rankin M. Smith had been told that a contract was being negotiated under which Five Smiths could reasonably expect to receive about $1,000,000 annually in such revenue. According to counsel's testimony, Smith would not have proceeded with the deal if he had not been assured of the TV income. The contract which Commissioner Rozelle negotiated with CBS satisfied those expectations. The district court found that the minimum amount of income Five Smiths could reasonably have expected to receive from the four-year CBS contract was as follows:

[7] 15 U.S.C. § 1291; *see* S.Rep.No. 1087, 1961 U.S.Code Cong. & Admin.News p. 3042 (1961). The statute provides in pertinent part that the antitrust laws shall not apply to any joint agreement by which a league of professional sports clubs sells its member clubs' rights in the telecasting of their games.

Year	Amount
1966	$ 1,248,000
1967	1,220,000
1968	1,142,500
1969	1,126,875
Total	$ 4,737,375

The nature and valuation of the various additional assets purchased by Five Smiths is discussed in greater detail below.

Five Smiths named its club the "Atlanta Falcons," and, as expected, the team began playing football in the NFL in the 1966 season.

II.

The Issues Restated

In the lower court, plaintiff taxpayer E. Cody Laird contended at the outset that either (1) the amount of the purchase price allocable to the players' contracts was $7,722,914.02,[8] to be amortized by Five Smiths over a 5.25-year useful life, or (2) in the alternative, Five Smiths' right to receive television revenues under the February 14, 1966 agreement had a fair market value of approximately $4.3 million and a useful life of four years and thus this right was also a depreciable asset. The district court, rejecting both contentions, held that the television rights under the four-year contract with CBS had a present value of $4,277,043.[9] However, construing the February 14, 1966 agreement between the NFL, the NFL member teams and Five Smiths, the district court found that Five Smiths had also

[8] This figure represents the total consideration paid by Five Smiths of $8,500,000.02, minus the items not in dispute, namely, the $50,000 membership fee and $727,086 in interest.

[9] This figure represents the application of a discount rate of 5% to $4,737,375, the total value of the payments which the district court found Five Smiths could reasonably expect to receive under the contract.

acquired rights to share ratably in a League television pool, which rights would last as long as the Atlanta club remained a member of the League, and that it was impossible therefore to ascertain a definite limited useful life of those rights. Accordingly, the court held that no depreciation deduction could be taken for the acquired television rights. Employing what was essentially a subtraction method of allocation, the district court also held that, after subtracting the present value of the television rights pursuant to the CBS contract from $7,722,914.02 [10] the total amount of the purchase price which remained after deducting interest and the membership fee, there remained only $3,445,871.02 to be allocated to the remaining assets. With regard to the players' contracts, the court ultimately adopted a compromise valuation, substantially as submitted by plaintiffs, of $3,035,000, and held that Five Smiths was entitled to claim depreciation deductions for the players' contracts, based upon that valuation and a useful life of 5.25 years. There thus remained of the total purchase price only the sum of $410,871.02, which was allocated to the cost of the franchise. The district court's allocation, in summary, was as follows:

Total Consideration Paid by Five Smiths			$8,500,000.02
Minus:	Items not in dispute		
	(a) Membership Fee	$ 50,000.00	
	(b) Interest	+$ 727,086.00	
		$ 777,086.00	-$ 777,086.00
Equals:	Total Amount in Dispute		$7,729,914.02
Minus:	Minimum Present Value of Television Rights	$4,277,043.00	-$4,277,043.00
Equals:	Remainder of Purchase Price Available for Allocation to Remaining Assets Acquired		$3,445,871.02
Minus:	Amount Allocated to Player Contracts	$3,035,000.00	-$3,035,000.00
Equals:	Remainder to Be Allocated to the Franchise		$ 410,871.02

[10] *See* note 8 *supra*.

Taxpayers have appealed from the judgment of the district court and the Government has cross-appealed. On appeal taxpayers contest the denial of a depreciation allowance for the television rights. They contend that Five Smiths is entitled to amortize the $4,277,043 present value, ascertained by the district court, of the company's television rights pursuant to the four-year contract with CBS. The Government's appeal contends that Five Smiths purchased a bundle of intangible assets whose values were so interrelated that it is impossible to allocate values to any of the individual assets except in an arbitrary fashion. Under this argument, the taxpayers are not entitled to any depreciation deduction. In the alternative, the Government contends that, assuming the total purchase price is capable of allocation among the various assets, the amount allocated to the players' contracts by the district court is not supported by the evidence.

III.

The Depreciation of Intangibles, in General

The Internal Revenue Code allows a reasonable depreciation deduction for the "exhaustion, wear and tear" of property used in the taxpayer's trade or business. I.R.C. § 167(a)(1). "The property, to be depreciable must be an inherently wasting asset, but this allowance is not limited to tangible assets." *Griswold v. Commissioner of Internal Revenue,* 5 Cir., 1968, 400 F.2d 427, 433, *quoted in Houston Chronicle Publishing Co. v. United States,* 5 Cir., 1973, 481 F.2d 1240, 1245, *cert. denied,* 414 U.S. 1129, 94 S.Ct. 867, 38 L.Ed.2d 754 (1974). The deduction is also available to certain types of intangibles. The Treasury Regulations explicitly provide:

> If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the

> length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to good will.

Treas.Reg. § 1.167(a)-3.

Contract rights may qualify for the deduction. *See* 4 Mertens, Law of Federal Income Taxation § 23.64, at 228-33 (rev. ed. 1973). For example, contracts for personal services have been held to be amortizable assets, *see KFOX, Inc. v. United States,* Ct.Cl., 1975, 510 F.2d 1365, 1378, as have contracts to receive royalties, *see Barnes v. Commissioner.* 8 BTA 360 (1927); Mertens, *supra,* § 23.69, at 252. Indeed, under a 1971 Revenue Ruling, the cost of a standard football player contract owned or controlled by a professional football team must be capitalized and amortized over its useful life. Rev.Rul. 71-137, 1971-1 C.B. 104. *cf.* Rev.Rul. 67-379, 1967-2 C.B. 127 (baseball player contract).[11]

IV.

The Government's Bundle-of-Rights Theory

At the outset, we consider the Government's theory that Five Smiths purchased a bundle of inextricably intertwined assets whose values are so interrelated that they

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[11] As the district court pointed out, Rev.Rul. 71-137 was not in existence at the time of the acquisition in this case. However, Rev. Rul. 54-441, 1954-2 Cum.Bull. 101, *revoked by* 67-379, 1967-2 C.B. 127, was in effect during the period in dispute and supports the depreciation of the players' contracts at bar.

are not eligible for the depreciation deduction. This theory, if correct and applicable to both the players' contracts and the television contract with CBS, would end further inquiry in the case. The Government would prevail completely.

The bundle-of-rights theory is the Government's chief argument. Its thesis, basically a restatement of the so-called "mass asset" rule, is that Five Smiths purchased "a mass asset whose value does not lie in its individual components but rather through the chemical reaction of the entire mass being employed as a whole." [12] In support of its contention, the Government lists a number of rights and intangibles alleged to have been acquired in the deal. The list includes not only those assets in dispute, *viz.*, the television rights and players' contracts, but also the exclusive territorial rights for NFL football within a 75-mile radius of Atlanta; the right to sell programs at home games; the right to participate in the college draft; and the right to share in the NFL's goodwill.[13] The Govern-

[12] Government's original brief at 21-22.

[13] The complete list set forth by the Government consisted of the following:

(1) The right to be the sole provider of NFL football within a 75-mile radius of Atlanta;
(2) Protection by League rules and regulations from intra-league business competition;
(3) The right to share in the proceeds of future NFL expansion (after 1967);
(4) The right to share equally with other NFL clubs in the revenue from all single network television contracts negotiated on a league-wide basis;
(5) The right to sell broadcast rights for preseason television and for both preseason and regular season radio;
(6) The right to share equally with other clubs in revenue from NFL Properties, Inc., and NFL Films, Inc.;
(7) The right to sell programs and advertising space therein at home games;

ment then projects various assumed values for some of these assets. When added together, these values total far more than Five Smiths' purchase price. These values are suggested to illustrate the point that valuations cannot be made on an individualized basis in a transaction like the present one, that the assets have value only in relation to one another when they are purchased *en masse*. Thus the rights come into being, and are susceptible to measurement, only in connection with the NFL franchise. The Government further notes that there is no market for the individual assets purchased by Five Smiths because they are never sold individually.

The bundle-of-rights concept is hardly novel. The Government raised essentially the same argument in *Houston Chronicle, supra,* a case involving the amortization of newspaper subscription lists in the context of the purchase by a newspaper publisher of a competing newspaper, where the purchaser did not intend to continue publishing the acquired paper. This court held that subscription lists such as those there at issue could be depreciated for tax purposes, provided the taxpayer-purchaser satisfied a dual burden in establishing its right to claim the deduction.

Houston Chronicle rejected a "monolithic 'mass asset' theory," 481 F.2d at 1253, and a *per se* rule of non-amortizability in every case involving the acquisition of both goodwill (or other assets with similar characteristics) and additional intangibles. *Id.* at 1249-50, 1253. A two-fold test, we said, controls a situation similar to the one at bar:

(8) The right to participate in the expansion draft, the college draft and the NFL waiver system;
(9) The right to share in the NFL's goodwill; and
(10) The right to a risk-free investment, as a consequence of a buy-back option in the contract between Five Smiths and the NFL.

> [T]he "mass asset" rule does not prevent taking an amortization deduction if the taxpayer properly carries his dual burden of proving that the intangible asset involved (1) has an ascertainable value separate and distinct from goodwill, and (2) has a limited useful life, the duration of which can be ascertained with reasonable accuracy.

Id. at 1250. *Accord, Richard S. Miller & Sons, Inc. v. United States*, Ct.Cl., 1976, 537 F.2d 446, 452.

Under that test, the mass-asset theory does not prevent a deduction in the present case for the players' contracts. First, the contracts had an ascertainable value separate and distinct from the value of the franchise (which thus has the same significance in this case as goodwill had in *Houston Chronicle*).[14] As will be explained more fully below, the valuation figure set by the district judge for the players' contracts was supported by the evidence, and reflected their own particular value, notwithstanding the fact that they were acquired in a bundle of rights and intangibles. Second, the district judge found, and it is not disputed on appeal, that the players' contracts had a limited useful life of 5.25 years.[15] Thus, the requirements of *Houston Chronicle* are met with respect to the players' con-

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[14] In *Houston Chronicle* one of the questions presented to the court was whether the subscription lists at issue were to be treated as goodwill for tax purposes. The court pointed out that in such cases the issue is often whether the particular intangible asset in dispute possesses characteristics similar to goodwill such that the reasons for denying amortization deductions for goodwill are fully applicable. *Id.*, 481 F.2d at 1247-49. Here the franchise is similar to goodwill in that it has an indefinite useful life and is an asset that will not diminish. Thus, the *Houston Chronicle* analysis is applicable.

[15] The 5.25-year useful life was accepted by the IRS in an engineering and valuation report, and apparently is not contested by the Government.

tracts. If the taxpayers could prove that the television rights also had a limited useful life, the mass-asset rule likewise would not bar a depreciation deduction for those rights. However, on the facts of this case, as will be shown below, taxpayers have not made such a showing.

Our conclusion that the mass-asset rule is inapplicable here finds further support in the decision of the Court of Claims in *KFOX, supra*. That case involved the purchase of an operating radio station in which the buyer acquired a number of assets, including contracts for the services of disc jockeys and the station manager, some tangible assets such as a radio transmission tower, and a transmitter site lease. The Government contended in that case that personal service contracts in dispute were inseparable from goodwill and, therefore, were not amortizable. Declining to follow such reasoning, the court held that personal service contracts such as those for the radio personalities and station manager "may be divisible from 'goodwill' and other intangibles and be treated separately for tax purposes." *Id.*, 510 F.2d at 1377. Relying on the Revenue Rulings which permit the amortization of professional athletes' contracts, the court held that the service contracts at the station could be amortized over the contracts' lives.

KFOX is closely in point. It does not matter, under the reasoning of that case, that the players' contracts herein have economic usefulness only in the context of a professional football team franchise. Obviously, the disc jockeys' and station manager's contracts in *KFOX* were only valuable in the context of a radio station, notwithstanding the fact that, according to the court, they had value independent of their contribution to the value of station KFOX's goodwill and FCC broadcast licenses, and that the service contracts might have had independent value to another station. *See* 510 F.2d at 1375, 1377. Moreover, it was conceded by the Court of Claims that the contracts were "at the heart of the profitability of the taxpayer." *Id.* at 1378.

Under *KFOX*, what is apparently important to defeat the applicability of the mass-asset rule is that the contracts "represent independent and uniquely valuable assets to the taxpayer." *Id.* Professional football players' contracts are such assets, the *KFOX* court pointed out:

> Looking at the particular facts of the instant case we see no reason why the contracts of the C & W announcers and the station manager should be dealt with in a manner different from that of athletic contracts. In both cases the contracts represent independent and uniquely valuable assets to the taxpayer, ensuring through their non-competition clauses that the individuals under contract will not use their skills with any competing organization. To KFOX, as to the professional ball teams, the performers and their contracts are at the heart of the profitability of the taxpayer. . . . [W]e believe these service contracts are amortizable.

Id.

The Government in its brief does not contend that any of the rights or assets in the instant case lack value. Indeed, the Government agrees that they possess "considerable value."[16] The point made by the Government is that any one of the rights or assets has "inherent value . . . only because of its [the asset's] juxtaposition with the other rights or assets."[17] We believe that the concession of value reveals the flaw in the mass-asset theory as applied here.

The Government concedes the soundness of the Revenue Rulings permitting the amortization of the acquisition cost of a professional football player, but maintains, however,

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[16] Government's original brief at 58.

[17] *Id.*

that the rulings are inapplicable unless a cost basis can be established. It is contended that under the facts of this case, and the peculiar interrelation among the assets purchased, a proper allocation of the purchase price is impossible. Thus, on the one hand, the Government seems to argue that the assets have no value except when they are viewed together and, on the other, that they do have a certain inherent value when considered separately but that that value is lost when the assets are bundled together.

The proposition that the individual assets sought to be amortized have no value except in the context of the entire bundle of rights and assets is at odds with the decisions discussed above. It does not matter for purposes of amortization if individual assets only have economic significance in the context of an integrated transaction involving the sale of a number of assets.

Nor do we agree with the Government that there is no market for the players' contracts. There is a market in the industry for veteran football players as shown by the existence of the waiver system and the fact that veteran players are regularly exchanged for other veterans or for draft choices even if such transactions do not ordinarily involve purchases for cash.

The Government fares no better with its contention of impossibility of allocation of value. That the assets contribute value to one another does not prevent their severability for tax purposes. *See Meredith Broadcasting Co. v. United States*, 1968, 405 F.2d 1214, 1224-29, 186 Ct.Cl. 1; *Jack Daniel Distillery v. United States*, 1967, 379 F.2d 569, 576, 180 Ct.Cl. 308. This is so even if the assets are worthless without one another. *See Meredith Broadcasting, supra.* Indeed, in a case like this, valuation of the players' contracts should take account of the impact of the franchise on the contracts' value, and vice versa. *See, e. g., Jack Daniel, supra.*

We have noted already the attempt by the Government to itemize each right acquired in the deal and to value separately each such right for the sake of demonstrating the error in the district court's valuation findings. As earlier stated, the Government's analysis concludes that the individual assets purchased could well be worth an amount far in excess of the total purchase price. Hence, the argument goes, the district court must have been in error, if only because of the impossibility of its task. But the Government fails to recognize that the valuation method adopted by the district court apparently took account of the interrelationship among the assets in valuing them. Such reasoning does not require mathematical certainty, nor even explicit calculation. Nor is the task so fraught with difficulty that we would assume its impossibility. We conclude that the Government's mass-asset theory is inapplicable to the present case.[18]

V.

The Television Rights

Taxpayers contend that the district court erred in holding that Five Smiths was not entitled to a deduction for the present value of its television rights under the four-year contract with CBS. The district court's denial of the de-

[18] We have also considered the Government's argument that its position herein is supported by *Sunset Fuel Co. v. United States*, 9 Cir., 1975, 519 F.2d 781. But that case is plainly distinguishable. Moreover, the court found that the accounts in the customer lists there at issue upon which the claimed deduction was based had not been individually valued. Even if this were a case where the individual players' contracts could not be valued individually, which it manifestly is not, the *Sunset Fuel* court expressly pointed out that "inability to establish a cost basis for particular accounts lost does not necessarily prevent a taxpayer from charging a truly wasting "indivisible asset" off against the income it currently generates, because the taxpayer can show that the mass as a whole has a limited useful life and depreciate it." *Id.* at 784 n.4.

duction was based upon its finding that Five Smiths' right to share ratably in the League television pool had no definite useful life the duration of which could be ascertained with reasonable accuracy. The district court's conclusion was based on the plain language of the February 14, 1966 Atlanta agreement. Taxpayers disagree with the district court's construction of that agreement. According to them, the Atlanta agreement conveyed to Five Smiths only the television rights under the four-year contract with CBS, and nothing more with regard to television revenues.

It will be recalled that the June 29, 1965 letter of understanding from Commissioner Pete Rozelle to Rankin M. Smith provided:

> Smith shall receive one-fifteenth of any sum paid by any network for any single network television contract commencing in 1966 and a pro rata share each year thereafter while Atlanta holds a franchise.

And the formal February 14, 1966 agreement specified:

> Smith shall be entitled to participate equally with all other member clubs in any Single Network television contract(s) hereafter executed by the League for the year 1966 and thereafter during the time the Atlanta Club continues as a member of the League.

Taxpayers construe these provisions, which are substantially identical, as referring only to the contract with CBS. They argue, with respect to the letter, that "single" and "commencing in 1966" are words of limitation which make it clear that rather than assigning Smith rights to share television revenues in perpetuity, the team owners were conveying only the right to share in the particular contract then being negotiated.

The construction of these provisions of the agreements is, of course, critical because, under section 1.167(a)-3 of the regulations heretofore quoted, an amortization allow-

ance can be had for an intangible asset only if the asset has a limited useful life and the duration of that limited useful life can be ascertained with reasonable accuracy.

We agree with the district court that the language in both the letter and the formal agreement clearly shows that Five Smiths' contention is erroneous. It is abundantly clear from these agreements that Five Smiths' television rights were to last as long as the Atlanta Club remains a member of the NFL. The words "during the time the Atlanta Club continues as a member of the League" and "while Atlanta holds a franchise" are not susceptible to any other reasonable construction: they signify a period of indefinite duration. Revenues received under any "single network television contract" refers to income from contracts negotiated on a League-wide basis for all the NFL teams, pursuant to the antitrust exemption which enabled the teams to combine to sell their nationwide broadcast rights, as opposed to those rights which were not subject to the sharing agreement (*e. g.*, a team's right to enter into an individual television contract for that team's preseason games). The use of the word "single" introduces no ambiguity into the agreement. Finally, the word "contract(*s*)" (emphasis added)—with an "s"—in that agreement can only support a plural construction, especially in light of the fact that the contract with CBS was signed before the final Atlanta agreement.

Taxpayers dispute the district court's finding that there existed a league television pool, involving further rights in addition to those pursuant to the four-year CBS contract. They rely heavily on the assertion that none of the teams was under any obligation to continue with the pooling arrangement after the expiration of the CBS contract, and that each team was free to return at that point to negotiating an individual contract for the televising of its own home games, as had been the practice prior to 1961. This argument is unpersuasive because it ignores, as the Government points out, the fact that the pooling arrangement

was, and is, of substantial economic benefit to the NFL teams. The antitrust exemption for professional sports teams was, in fact, intended to enable them to bargain collectively with the networks in order for the teams, especially the weaker NFL clubs, to obtain continuing and larger television incomes for themselves in a group that might not have been possible had they bargained individually. *See* S.Rep.No. 1087, 1961 U.S.Code Cong. & Admin. News, p. 3042. The effect of that legislation has been dramatic. In the year before the exemption was granted by Congress, per team television income for NFL clubs was approximately $150,000 a year. The figure topped $1 million per team in 1965, the year before the CBS contract here in contention took effect. Under the new contract, television revenues rose to about $1,250,000 per team the following year. Today they are substantially higher. The following chart shows the growth pattern for that income: [19]

Year	Total Contract Price	Per Team
1962	$ 4,650,000	$ 332,143
1963	4,650,000	332,143
1964	14,100,000	1,007,143
1965	14,100,000	1,007,143
1966	18,800,000	1,248,000
1967	20,050,000	1,223.125
1968	20,300,000	1,238,750
1969	20,050,000	1,223,125
1970	18,000,000	1,384,615
1971	18,000,000	1,384,615
1972	18,000,000	1,384,615
1973	19,000,000	1,461,538
1974	20,500,000	1,576,923
1975	22,500,000	1,730,769
1976	22,500,000	1,730,769
1977	22,500,000	1,730,769

[19] Government's original brief at 11.

Even the significance of the early figures was as clear at the time of the Atlanta franchise deal as it is now in hindsight. Five Smiths was obviously not going to forego the benefits of the League television pool—especially when television revenues were an important inducement for the purchase of the franchise.

Taxpayers also contend that, even assuming *arguendo* that Five Smiths did acquire the right to share in future television income, in addition to the rights under the four-year CBS contract, the latter constituted a separate asset which was depreciable. Taxpayers reason that Five Smiths' interest in the CBS contract had both a proven value (the $4,277,043 present value of the club's guaranteed income under the contract) and a definite four-year limited useful life. But as the Government correctly points out, the rights under the CBS contract were only a "four-year link" in a "perpetual chain" of television income.[20] Though the existing contract provided a measure of Five Smiths' television rights over a particular four-year period, nevertheless the rights were to continue indefinitely. Determining a valuation for the four-year CBS contract is unnecessary to our decision, since we hold that Five Smiths' television rights at issue have an unlimited useful life, and thus cannot be amortized. Because the rights pursuant to the CBS contract were only a link in a chain of revenue which would continue as long as the Atlanta Club holds an NFL franchise, they did not constitute a wasting asset so as to require being valued for amortization purposes, and we thus decline to value them.

Nor are we impressed by taxpayers' final argument on the issue of television rights that, since the CBS contract did not contain a renewal option, any further television contracts would require new bargaining between the networks and the NFL teams. Taxpayers argue on that basis that future rights do not extend the useful life of the four-year television contract. This argument is also without merit. Although the CBS contract provided a measure of

[20] *Id.* at 36.

the value of Five Smiths' television rights, the source of those rights was the Atlanta agreement. Indeed, the CBS contract preceded the entry into the League of the Atlanta Club. Five Smiths' right to share in the revenues from network television contracts is indefinite in duration, and continues as long as Atlanta remains a member of the League. The right has relevance far into the future. Televised NFL football is by now a national tradition. We can be confident that Five Smiths' television rights will have substantial value as long as there remains an NFL and a television set in every living room.

Applying Treas.Reg. § 1.167(a)-3 to the circumstances here, it is clear that the unlimited life of the television rights defeats any attempt to amortize the income received under the CBS contract.

VI.

Valuation of the Players' Contracts

The final issue involves the correctness of the district court's valuation of the players' contracts. The Government contends, as an alternative argument to its bundle-of-rights theory, that, even if the players' contracts could be separately valued, the district court's method of valuation was arbitrary and unsupported by the evidence and, thus, was clearly erroneous. The Government asserts, among other things, that the district court's subtraction method of allocating the purchase price in the Atlanta deal among the various assets purchased was improper. It also complains of the district court's opinion on valuation of the players' contracts. Though we do not agree with the district court's subtraction, or residual, method of allocation, we nevertheless find that the evidence was sufficient to support the valuation reached by the trial court.

Basically, under *Houston Chronicle,* taxpayers must prove that the players' contracts had an ascertainable

value separate and distinct from the value of the franchise (or, more generally, from goodwill), and a limited useful life, the duration of which could be measured with reasonable accuracy. It is uncontested that the players' contracts had a 5.25-year useful life. That the players' contracts had some value cannot be disputed. The IRS itself initially valued the players' contracts at over $1 million. The district, court, after hearing a substantial amount of evidence in the case, valued the contracts at more than three times the figure fixed by the IRS. Indeed, it is clear that the players are the primary assets of a professional football club. Without them, there could not be a game. As Texas E. Schramm, the widely-respected President and General Manager of the Dallas Cowboys, testified:

> The players are your principal product, and it is players who are responsible for you[r] winning. They are responsible for the fans coming to your stadium. They are responsible for the income that you receive on television.
>
> Without the players, in professional football, you don't have anything.[21]

Furthermore, it is obvious that these players' contracts are not only intangible assets but are assets separate from the others purchased in the deal. The value of the players is almost entirely a function of their worth as professional football players.

As indicated earlier, the district court accepted a compromise valuation of the contracts which was submitted by the taxpayers. Taxpayers' evidence on valuation was based largely on expert testimony, which the Government, to a large extent, left uncontroverted.[22] Schramm testified that,

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[21] App. at 204.

[22] The Government points to two sources of evidence to support an allocation of approximately $1 million for the player contracts:

in his opinion, the forty-two players' contracts purchased by Five Smiths had a fair market value in 1966 of $7,300,000. Schramm's valuations were based upon a sliding-scale rating system under which each player was classified in one of five categories, arranged in order of ascending potential player value to the team. In the lowest category were placed players who had at least made a professional football team, who were valued at $50,000 each. In the highest category were placed the players who, it was expected, would be starters, who were each valued at $250,000. In between at $50,000 increments in value were three other categories. After each of the players whose contracts were acquired by Five Smiths were so valued, Schramm's total came to $7,300,000. Schramm testified that his valuations were founded on personal knowledge of the veterans and on data which was in the record. He considered, among other things, the salaries which the Atlanta team was assuming under the acquired contracts. He also compared the veterans as a group to those rookies who were selected in the first three rounds of the 1965 college draft, and said that the veterans would have been more valuable to a professional team because of their experience.

James Finks, General Manager of the Chicago Bears and former General Manager of the Minnesota Vikings, arrived at a valuation of $6,825,000. Finks' valuation also reflected personal knowledge of the players, consideration of the data in the record, a comparison of the forty-two veterans with the rookies selected in the top rounds of the

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(1) the IRS Engineering and Valuation Report, which recommended a total valuation of $1,050,000 for the players' contracts, App. at 880; and (2) the testimony of Dr. Roger Noll, an economist, who was the Government's principal witness, Rec., vol. XII, at 92, from which the Government derives a total valuation of approximately $1.4 million, *see* Government's original brief at 93. The valuations in either instance involve the use of averaging. We find them thoroughly unpersuasive.

college draft, and the assumption that the experience factor made the veterans more valuable than the college rookies.

The district court rejected the two experts' valuations for two reasons. First, their total valuation figures greatly exceeded the $3,445,871.02 which the district court had determined was available for allocation to the players' contracts, after subtracting from the total purchase price under the so-called subtraction method the amounts allotted to the NFL membership fee ($50,000), interest ($727,086), and the calculated minimum present value of the television rights ($4,277,043). Second, the court said it disapproved of the comparison between rookie college players and proven veterans, but nevertheless gave substantial weight to comparison evidence.

Ultimately, the court relied on a compromise approach combining (1) the qualitative judgments of Atlanta's first coach, Norbert Hecker, as to the relative potential contributions to the team expected of the college rookies, on the one hand, and the NFL veterans, on the other; (2) the quantitative valuations of Schramm and Finks; and (3) the cost of acquiring the rookies. The method was as follows. A given veteran acquired in the expansion draft would be described in terms of size, talent, NFL experience, playing history, etc. The amounts paid to sign college rookies who played the same positions were then compared to the usually more modest salary rate of the veterans' contracts. The difference in price was invariably striking. Testimony by Hecker as to the relative potentials of the veterans and the rookies was also considered; such comparisons, as a rule, yielded the conclusion that the veterans were far more valuable to the team, since they were known quantities, while rookies were untried in the NFL and lacked professional experience. Based on the relative merits, then, the dollar valuations placed upon the veterans by the district court, which were comparable to and some-

times even lower than those placed upon the rookies, were conservative, especially when compared to the valuations provided by Schramm and Finks.[23]

Since the valuation of assets is a factual finding, *Silverman v. Commissioner of Internal Revenue*, 2 Cir., 1976, 538 F.2d 927, 931, *petition for cert. filed*, ——U.S. ——, 97 S.Ct. 2649, 52 L.Ed.2d —— (1977); *Anderson v. Commissioner of Internal Revenue*, 5 Cir. 1957, 250 F.2d 242, 249, *cert. denied*, 356 U.S. 950, 78 S.Ct. 915, 2 L.Ed.2d 844 (1958); *cf. United States v. Stringfellow*, 5 Cir., 1969, 414 F.2d 696, 699, the Rule 52(a), Fed.R.Civ.P., standard of review is applicable here. *Stringfellow, supra*, 414 F.2d at 699; *see Anderson, supra*, 250 F.2d at 249. Given the inherent impression of the valuation function, our application of that standard is guided by the principle announced by this court in *Anderson*:

> Valuation . . . is necessarily an approximation . . . It is not necessary that the value arrived at by the trial court be a figure as to which there is specific testi-

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[23] The source of the $3,035,000 total valuation figure accepted by the court is unclear. The court presents this figure as taxpayers' own, based upon the method described in the accompanying text. In Plaintiffs' Supplemental Post-Trial Brief, it appears that the figure urged upon the court was actually $3,010,000. *See* Supplemental Post-Trial Brief for Plaintiffs at 33. However, that brief contained alternative methods of valuation, each of which reached a somewhat different result, but was designed to show that the proper figure was in excess of $3 million. Under one such method, based upon the average bonus cost of players chosen in the first five rounds of the college draft, taxpayers projected a figure of $3,036,000. *Id.* at 40. Given the total amount involved in this case, the relatively small size of the discrepancy in comparison, and the fact that the valuation of the players' contracts was inherently an estimate, we find it unnecessary to alter the district court's specific computation for the reason that it is unexplained. *See generally Archer v. Commissioner of Internal Revenue*, 5 Cir., 1955, 227 F.2d 270, 273.

> mony, if it within the range of figures that may properly be deduced from the evidence. . . .

250 F.2d at 249.

The various comparisons between veteran and rookie players provided a reasonably reliable measure of the value of the expansion draftees. The Government contends that comparing the bonus paid to a rookie college draftee with the fair market value of a veteran's contract is like comparing apples and oranges. We disagree.[24] The evidence in this case involved both quantitative and qualitative comparisons. The Atlanta team needed players to stock its squad and such players had to be acquired somewhere. If the Atlanta Falcons had been unable to obtain players in the expansion draft, they would have had to develop other players. The college draft provides the primary source of talent for professional football teams, and the prices in that marketplace showed the cost of substitute personnel herein. *Cf. Richard S. Miller, supra,* 537 F.2d 446, 456.[25] The absence of a regular cash market for veteran players necessitated reference to prices in the college draft.[26] Comparison evidence was competent and relevant.

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[24] The Government also complains about individual dollar figures employed by taxpayers in their comparisons between particular players. In light of the nature of our task, it is plain that the district court's valuation, involving as it does millions of dollars and dozens of players' contracts, does not stand or fall on this type of attack.

[25] In *Richard S. Miller* the court said that the value of insurance "expirations," which weer useful in the insurance industry in soliciting renewals of policies, was measured by the cost the purchaser of the "expirations" would have incurred to develop an equivalent quantity of new business. *Id.,* 537 F.2d at 456.

[26] To be sure, those prices were high because of the intense price competition for players due to the NFL-AFL war. However, the valuation of the veterans' contracts must take account of the economic realities at the time of acquisition.

And the use of such a comparison approach—of valuing an asset by determining what similar assets were sold for in arm's length transactions—has met with the approval of this court. *See, e.g., Green v. United States,* 5 Cir., 1972, 460 F.2d 412; *Phillips Petroleum Co. v. Bynum,* 5 Cir., 1946, 155 F.2d 196, *cert. denied,* 329 U.S. 714, 67 S.Ct. 44, 91 L.Ed. 620.

As a qualitative matter, the Government maintains that top-round college draft picks who were the cream of the crop in their sport cannot be compared with veteran players who were in some cases "aged" and/or "marginal" and whose own teams were willing to give them up. Yet there was ample evidence that, in fact, the veterans were considered superior as a group to the college rookies. Each man acquired in the expansion draft had made an NFL team. A number of them had been starters for their selling teams. The evidence also showed:

> —The forty-two players had a total of 149 years of prior experience in the NFL, or an average of approximately 3.55 years per man.
>
> —Twenty-five players were on Atlanta's active roster at the start of the 1966 season; of those, eighteen started regularly and the other seven were starters on occasion. All but three of the twenty-five players wound up the season on the Falcon's active roster.
>
> —Of the seventeen players who did not begin the 1966 season on the active roster, two were traded (one

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The Government argues that the lack of a cash market for the veteran players is one reason that the comparison was invalid. Even as a general proposition, we are disinclined to accept this argument. *See* 10 Mertens, *supra,* § 59.01, at 5 n. 24. Moreover, the absence of such a regular market is no reflection on the value of veterans. Veteran players are regularly traded for other players or draft choices. Thus, a market exists, only cash is not the currency. Also, the fact is that an NFL franchisee, *i.e.,* Five Smiths, did actually pay cash to member teams for its veterans' contracts.

of them for another player who made the squad); one was placed on the injured reserve list; four players were waived and claimed by other teams (for which those players played in 1966); three were placed on Atlanta's reserve list. Only seven men were released entirely and did not play football.

—The start of the 1967 season saw the return to the active roster of nineteen of the expansion draftees. All but two played regularly throughout the season. Two were traded during the season.

—Eight of the original group of veterans remained on the active roster of the club throughout the following season.

—Ultimately, thirteen of the forty-two veterans were traded. In exchange for those players, the club received fourteen draft choices and also five players who became Falcon starters.

—Although none of the draftees remained on the squad after the 1968 season, others who had been acquired in exchange for those players were still with Atlanta.

These players may not have been cream of the crop of veterans in the NFL, but they were far from "marginal" players. The evidence, buttressed by the experts' testimony as to the relative superiority of the veterans over the rookies, clearly shows that the expansion draftees had substantial value. Furthermore, the total valuation figure reached by the trial court was well within the range of figures supported by the evidence.

The district court was justified in finding that the witnesses were credible. "Tex" Schramm's name is a household word in pro football and is synonymous with professional management in the NFL. As President and General Manager of the Dallas Cowboys, which was an expansion

team, he has engaged in precisely the types of judgments called for in the instant case. Finks is also well known; he, too, is the General Manager of an expansion team and is widely regarded for his expert knowledge. Hecker was Atlanta's first coach, and dealt with these players personally on a professional basis. The trial judge was also justified in discounting the testimony, as he thought necessary, in the process of valuing the players' contracts. Insofar as Schramm and Finks were expert witnesses, the court was not bound by their opinion testimony, but could weigh it along with the other evidence. *Silverman, supra,* 538 F.2d at 933; *Logan Lumber Co. v. Commissioner of Internal Revenue,* 5 Cir., 1966, 365 F.2d 846, 852-53; *Anderson, supra,* 250 F.2d at 249. On the other hand, the testimony of Hecker, who was Atlanta's head coach and who had closest knowledge of these players, was properly credited by the court. *See Houston Chronicle, supra,* 481 F.2d at 1253. His testimony as to qualitative value was highly probative of the dollar valuations, in light of the other quantitative evidence.

The fact that the valuation method adopted by the district court arrived at what was, in essence, a compromise figure—roughly midway between the positions of the parties—in no way diminishes the validity of that valuation. The district court was called upon to measure the worth of men, not machinery, a task of no small proportions. In a situation like the one at bar, arriving at a compromise figure was an acceptable valuation solution. *See Anderson, supra,* 250 F.2d at 248-49.

Our opinion as to the accuracy of that figure is reinforced by recent legislation dealing with the transfer of players' contracts in connection with the sale of a sports franchise. Under section 212 of the Tax Reform Act of 1976, Pub.L. No. 94-455, 90 Stat. 1545 (codified at 26 U.S.C. § 1056(d)), there is a presumption that

> not more than 50 percent of the [total] consideration [in the sale] is allocable to contracts for the services of athletes unless it is established to the satisfaction of the Secretary that a specified amount in excess of 50 percent is properly allocable to such contracts. Nothing in the preceding sentence shall give rise to a presumption that an allocation of less than 50 percent of the consideration to contracts for the services of athletes is a proper allocation.

Because the instant transaction took place before December 31, 1975, it is not governed by the Act. *Id.*, 26 U.S.C. § 1056 note. However, the presumption clearly indicates Congress' view that, as a general proposition, half the total consideration for a sports franchise properly may be allocated to the players' contracts. In light of the congressional presumption, the district court's valuation figure was reasonable.

Finally we consider the problem of apportionment of basis, or the Government's quarrel with the so-called subtraction method of the district court. At the heart of the Government's argument is the premise that the total of the individual asset values herein was greater than the lump sum purchase price. For example, the Government maintains that the television rights were greatly undervalued and that the territorial rights were not valued at all, even though the latter were worth more (in the Government's view) than the television rights. According to this argument, the result under the subtraction method is different, depending upon where the analysis begins. To begin with the television rights herein (as valued by the Government), for example, would leave nothing of the total purchase price for allocation to the players' contracts.

The Government contends that the proper way to allocate cost among a group of assets acquired in a bundle, where it can be shown that the sum of the individual values is unequal to the total purchase price, is to determine values based upon the relative fair market values of the individual assets in relation to the total cost. It is further argued that such an approach requires the valuation of each one of the assets acquired in the deal. The Government maintains that this approach is mandated by Treas. Reg. § 1.167(a)-5, which provides in pertinent part:

> *Apportionment of basis.* In the case of the acquisition . . . of a combination of depreciable and nondepreciable property for a lump sum, as for example, buildings and land, the basis for depreciation cannot exceed an amount which bears the same proportion to the lump sum as the value of the depreciable property at the time of acquisition bears to the value of the entire property at that time. . . .

The regulation requires a determination of a particular asset's proportional value in relation to the total package. If we assume *arguendo* the correctness of the Government's contention that the sum of individual asset values was greater than the total purchase price herein, then the subtraction method was improper. We have, of course, rejected the subtraction approach taken below and for reasons we have expressed. However, the regulation does not require the valuation of each of the assets in the deal. In this case, the basis of the players' contracts can be calculated without valuing every right acquired by Five Smiths, and the regulation does not require such additional valuations.

The district court found that the players' contracts were worth $3,035,000. We have accepted that finding. The total value of the bundle of assets [*i. e.*, of those remaining in dispute, after subtracting the membership fee and interest] was $7,722,914. For it has been held that "fair market value is the price at which property would change hands in a transaction between a willing buyer and a willing

seller, neither being under compulsion to buy or sell, and both being reasonably informed as to all relevant facts." *Jack Daniel, supra,* 379 F.2d at 574; *Anderson, supra,* 250 F.2d at 249. *See generally* 10 Mertens, *supra,* § 59.01, at 4. The Atlanta deal was such a transaction. Therefore, the value of the bundle of rights was what Five Smiths paid for it.

Accordingly, the regulation is satisfied, and the district court's holding as to the amortization of the value of the players' contracts at the sum of $3,035,000 is correct.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Caption Omitted in Printing)

Before BROWN, *Chief Judge,* AINSWORTH, *Circuit Judge,* and JAMESON*, *District Judge.*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants cross-appellees be condemned to pay one-half of the costs on appeal to be taxed by the Clerk of this Court; and that defendant-appellee cross-appellants be condemned to pay one-half of said costs.

August 4, 1977

Issued as Mandate: August 26, 1977

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* Senior District Judge of the District of Montana, sitting by designation.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 17892

E. CODY LAIRD and JOANNE H. LAIRD, *Plaintiffs*
v.
UNITED STATES OF AMERICA, *Defendant*

Judgment

(Filed April 10, 1975)

This action came on for trial before the Court, Honorable Frank A. Hooper, District Judge, presiding, and the issue having been duly tried and a decision having been rendered,

It is ORDERED and ADJUDGED that plaintiffs, E. Cody Laird and Joanne H. Laird, recover of the defendant, United States of America, the sum of $24,808.50, which sum consists of the following:

1967	$ 8,403.24	Tax
	2,146.58	Assessed interest
	$10,549.82	
1968	$11,927.50	Tax
	2,331.18	Assessed interest
	$14,258.68,	Plus interest as provided by law.

Parties to be heard on taxation of costs.

Entered this 10 day of April, 1975.

/s/ FRANK A. HOOPER
United States District Judge

Approved as to form:

Emmett J. Bondurant, II
Attorney for Plaintiffs

/s/ JOHN F. MURRAY
John F. Murray
Attorney for Defendant

(Caption Omitted in Printing)

Order of Court

(Filed February 20, 1975)

Plaintiff's counsel is directed to prepare and submit to this court a proposed Judgment to be entered in the above stated case, pursuant to attached Findings of Fact and Conclusions of Law.

This the 26th day of February, 1975.

/s/ FRANK A. HOOPER
Frank A. Hooper
Senior District Judge

(Caption Omitted in Printing)

Statement of the Case

Plaintiff taxpayers brought suit against the United States to recover income taxes (and interest thereon) assessed against and collected from them with reference to the tax years 1967 and 1968.

Plaintiffs' right to the refund sought in this case depends upon the resolution of several novel and complex issues concerning the validity of income tax deductions claimed by The Five Smiths, Inc.,[1] a Georgia corporation whose primary purpose and principal business was the ownership and operation of the Atlanta Falcons, a professional football team which was a member of the National Football League.[2]

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[1] Hereinafter referred to as "Five Smiths".

[2] Hereinafter referred to as "NFL".

I. Procedural Posture of the Action

During the years in question, plaintiff E. Cody Laird, Jr.,[3] was a stockholder of Five Smiths. For its taxable years ending January 31, 1967 and January 31, 1968, Five Smiths elected to be taxed as a "Sub-chapter S Corporation" pursuant to Title 26 U.S.C. §§ 1371-1379, and the corporation's tax consequences were passed through to the stockholders.

Five Smiths reported losses of $506,329.00 in 1967 and $581,047.00 in 1968, and plaintiffs, in turn, reported on their tax return their proportionate share of the losses of the corporation in the amount of $30,380.00 in 1967 and $34,638.00 in 1968. Subsequently, the Internal Revenue Service audited the tax returns of Five Smiths and disallowed certain deductions which resulted in the determination that the corporation realized taxable income in the amounts of $544,404.00 in 1967 and $641,692.00 in 1968, rather than the losses originally reported. The IRS thereafter also audited plaintiffs' returns for 1967 and 1968, disallowed deductions of their proportionate share of the corporation's claimed losses, and included in gross income plaintiff's share of the corporation's taxable income. Plaintiff paid the assessments, submitted a claim for a refund, and after its disallowance, filed the instant suit seeking judgment against defendant in the amount of $48,218.99, plus interest and costs.

II. The Disputed Deductions

In 1966, Five Smiths purchased from the NFL and its fourteen member teams certain assets thought to be necessary to the establishment and operation of a NFL team in Atlanta, Georgia. The issues presented in this case concern the tax consequences of that purchase.

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[3] Plaintiff Joanne H. Laird was not a stockholder of the Five Smiths but is a party to this action by virtue of having filed joint income tax returns with her husband for the years in question.

The total amount of cash consideration paid by Five Smiths in exchange for the assets acquired from the NFL and its member teams under the terms of the formal agreement between the parties dated February 14, 1966 was $8,500,000.02. On its tax returns for each of its taxable years ending January 31, 1967 and January 31, 1968, Five Smiths treated the $8,500,000.02 as follows:

1. $50,000 was reported as the admittedly nondepreciable cost of the NFL franchise;
2. $727,086 was reported as deferred interest and the appropriate deduction was taken; and
3. $7,722,914.02 was reported as the cost of forty-two veteran professional football player contracts and options and, on the basis of an estimated useful life of 5.25 years, depreciation deductions of $1,471,031.24 were taken in each of the taxable years in question.

Pursuant to audit, the IRS agreed that the treatment accorded the $50,000 cost of the franchise and the $727,086 deferred interest was proper, but determined that only $1,050,000 should be allocated to the depreciable asset "player contracts and options" and that $6,722,914.02 (the remainder of the total purchase price less interest in the amount of $727,086) should be allocated to the non-depreciable cost of the NFL franchise. Accordingly, the depreciation deductions claimed by Five Smiths in the amount of $1,471,031.24 in each year were disallowed to the extent of $1,271,031.24.

Disallowance of these depreciation deductions led to the assessments made against the plaintiff and ultimately to this litigation.

III. The Issues

The initial issue is whether the sum of $7,722,914.02 claimed by Five Smiths as the basis for depreciation of

forty-two veteran professional football player employment contracts reflects with reasonable accuracy the acquisition costs of the contracts when viewed in the context in which they were acquired, or whether that sum was arbitrarily and erroneously assigned for the purpose of achieving favorable tax consequences.

An alternative issue is whether Five Smiths rights to participate equally with the other member clubs in network television contracts was a depreciable intangible asset.

IV. Positions of the Parties

In support of the accuracy of the deductions claimed by Five Smiths, plaintiff contends:

1. that the February 14, 1966 agreement between Five Smiths and the NFL and its fourteen member teams establishes conclusively that the purchase price paid for the player contracts and options was $7,722,914.02, and that the sum was arrived at through arms length negotiations between buyer and seller and was reasonable under the circumstances existing at the time; and

2. that no part of the consideration paid to the fourteen member teams can be attributed to the cost of the NFL franchise because (a) the NFL as an entity was separate and distinguishable from the fourteen member clubs, (b) in February, 1966, the franchise was not worth more than the sum of $50,000.00 as specified in the Constitution and By-Laws of the NFL as the cost of a franchise, plus the non-cash consideration agreed to by the Five Smiths, and (c) where separate properties are sold by separate entities to a common purchaser the transactions can not lawfully be lumped together and the costs can not be merged.

In the alternative, plaintiff contends that Five Smiths' right to receive television revenue under the terms of Article VIII (f) of the February 14, 1966 agreement had a fair market value of approximately $4.3 million and a

useful life of four years and was also a depreciable intangible asset.

In opposition to the deductions claimed by Five Smiths, the government contends:

1. that, in order to gain entrance to the NFL, Five Smiths was charged a total fee of $8,500,000 in exchange for which the NFL and its members gave up and Five Smiths acquired a bundle of inextricably related assets including membership in the NFL, forty-two veteran player contracts, a pro rata share of television revenue, the right to be the sole provider of NFL football in the territory within a seventy-five mile radius of Atlanta, the right to secure players through participation in the college draft of rookie players, trades with other teams, and the waiver system, and other related assets;

2. that implicit in the allocation of $8,450,000 to the cost of player contracts and $50,000 to the cost of the franchise is the conclusion that other valuable assets (*e.g.*, television rights) had a fair market value of zero, a conclusion which the government views as erroneous;

3. that, while the agreement between the parties specifies that the purchase price of membership in the league was $50,000.00 and the purchase price of the forty-two player contracts was $8,450,000.00, the terms of the agreement did not represent the economic realities of the transaction but were agreed upon with a view toward achieving certain favorable tax consequences, and that for tax purposes, the substance of a transaction (*i.e.*, the economic realities) must prevail over the form (*i.e.*, the documents).

With regard to plaintiff's alternative argument, the government contends that Five Smiths' right to participate equally with the other member teams in television revenue was not a depreciable intangible asset because it had no limited useful life the duration of which could be determined with reasonable accuracy.

Findings of Fact

1. In 1965 and 1966, the NFL was an unincorporated, non-profit, tax-exempt association of professional football clubs. Prior to the admission of the Atlanta Club, the League consisted of fourteen member teams. League affairs were conducted by a Commissioner who acted pursuant to authority conferred upon him by the Constitution and By-Laws of the NFL and by resolutions voted upon and approved by a specified number of the member teams. Funds to meet the operating expenses of the League were acquired through periodic assessment of the member clubs.

2. The member clubs of the NFL were in a unique relationship with each other. While the precise nature of the association is impossible to describe in purely legal terms, it might be characterized as a joint venture, or trade association organized for the purpose of promoting and fostering the primary business of its members. While the member teams were competitors on the playing field, they were seldom competitors in the business sense. The nature of the League was such that the members were bound by rules and regulations designed to promote competitive balance among themselves.

3. In 1965, both the NFL and a rival professional football league, the AFL, were interested in expanding their respective leagues by selling a league franchise for operation by 1966 in Atlanta, Gorgia. The two leagues were engaged in keen competition during the mid 1960's, and this so-called "war" between the leagues had resulted in increased costs to the team owners in both leagues for players and other assets.

4. The purchase of an NFL franchise admitted the purchaser into membership in the NFL. In 1966, the creation and sale of a NFL franchise required the affirmative vote of twelve of the fourteen member clubs. In addition, the NFL Constitution specified that, in order to become a member of the League, a professional football team was required to agree to be bound by League rules and regulations, to pay all League assessments, and to pay a fee of $50,000.00. The $50,000.00 was used by the NFL to defray expenses of implementing the expansion.

5. Membership in the NFL carried with it substantial and valuable rights and benefits, including the following:

(a) The exclusive right to exhibit NFL football within seventy-five miles in every direction from the corporate limits of the home of the team; *i.e.*, no other member of the NFL was permitted to play games (except games with the home club) in the home territory of a member and no franchise could be granted for operation within the home territory of a member without the prior written consent of that member.

(b) The right to participate in and obtain players through the college draft, trades with other teams (for players or future draft choices), and the waiver system.

(c) The benefit of league administrative services including such things as preparation of game schedules, negotiation of television contracts, organization of the college draft, resolution of disputes among member clubs and others.

(d) The benefit of league rules and regulations restricting business competition among the member clubs.

6. The value of the NFL franchise was substantial, although the court can not determine its precise value with any degree of accuracy under the available evidence.[4]

7. The following letter dated June 29, 1965 from Commissioner Rozelle to Rankin Smith confirmed the understanding between the parties relating to the sale of the franchise and related assets.

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[4] *See* Conclusion of Law No. 10.

29 June 1965

Mr. Rankin M. Smith
Life Insurance Company of Georgia
573 West Peachtree Street, N.E.
Atlanta, Georgia 30308

Dear Mr. Smith:

This shall confirm the understanding between the National Football League (hereinafter referred to as "National") and Rankin M. Smith (hereinafter referred to as "Smith") to the effect that National has granted a franchise in said league to Smith to be operated in Atlanta, Georgia, commencing with the 1966 football season subject to the following terms and conditions:

1. Smith agrees to pay the sum of fifty thousand dollars ($50,000) for said franchise; $25,000 of said amount shall be paid on or before July 10, 1965, and the balance upon the obtaining of a satisfactory lease on the Atlanta stadium as herein set out.

2. Smith further agrees to pay to the member clubs of National the sum of $8,450,000 for the purchase of players owned by the member clubs of National to be assigned and transferred to Smith as hereinafter set out. Said sum of $8,450,000 shall be paid to the Commissioner of National as trustee for the member clubs in the following manner: 25% on but not before August 15, 1966, and the balance in four equal annual installments on the 15th day of each August thereafter until fully paid.

3. Each member club shall sell Atlanta following the close of the 1965 season three veteran members of its active list then under contract. The identity of such players and the method of selection shall be pursuant to a formula hereafter adopted by the member clubs at the 1966 annual meeting of National. Under such formula each club may withhold a fixed number of players free from selection and

shall make the balance of its active list available for selection to Smith. Smith shall not be entitled to select more than three players per club.

4. This agreement by Smith is contingent upon Smith being able to obtain a satisfactory lease for the use of the Atlanta stadium permitting Smith to operate a National Football League franchise in Atlanta and to use said stadium upon terms satisfactory to Smith for a minimum peroid of ten years commencing in 1966; such lease to be awarded on or before the 6th day of July 1965.

5. When the lease shall have been acquired and Smith admitted as a member of National, Smith shall receive the following:

A. A franchise for Atlanta in National.

B. Smith shall be entitled to participate in the 1965 selection meeting of National and shall be awarded the first choice in the first twenty rounds thereof and an extra choice at the end of each of the first five rounds.

C. Smith shall receive one-fifteenth of any sum paid by any network for any single network television contract commencing in 1966 and a pro rata share each year thereafter while Atlanta holds a franchise.

6. The selection of management and coaches shall be subject to the prior approval of the Commissioner of National. Similarly, any other persons other than Smith who shall own a share in said club shall be subject to approval by the member clubs of National. In no event shall Smith personally own less than fifty-one percent of said franchise.

7. In addition thereto Smith shall personally guarantee all financial obligations hereinabove set out.

8. If a sixteenth franchise is granted, Smith shall not participate in any share of any monies paid for such new franchise granted by National.

9. The entity to operate the franchise and the persons owning any interest therein shall be subject to and bound by the Constitution and By-Laws of the National Football League.

This letter shall constiute a memorandum agreement and be binding upon National and Smith. Upon its execution and upon the procurement of a lease on the stadium hereinabove referred to, a more formal document shall be prepared and executed setting forth in detail the terms thereof.

If this letter meets with your approval, kindly affix your signature on a duplicate copy thereof at the place indicated and the same shall constitute a binding agreement between us.

Very truly yours,

THE NATIONAL FOOTBALL LEAGUE

By: /s/ PETE ROZELLE
Pete Rozelle, *Commissioner*

I have read the foregoing, consent thereto, and agree to be bound thereby.

/s/ RANKIN M. SMITH
Rankin M. Smith

8. On August 6, 1965, Rankin M. Smith, R. Howard Dobbs and M. E. Kilpatrick successfully petitioned the Fulton County Superior Court for the incorporation of a busines under the name "The Five Smiths, Inc." Subsequently, Rankin M. Smith acquired 64% of the outstanding stock of the corporation and plaintiff E. Cody Laird, Jr. acquired 6% of the stock. On September 3, 1965, at the first meeting of the Board of Directors of Five Smiths, Rankin Smith

reported that ". . . the 42 players to be acquired from the other fourteen clubs in the league will be the least talented players of each team, since the selling clubs will naturally reserve the most talented players . . . ."[5]

9. Five Smiths participated in the college draft of rookie players conducted in November of 1965, and was allowed first choice of players in each of the first twenty rounds and an extra choice at the end of the first five rounds. The twenty-four college draftees who signed NFL contracts (one draftee went to an AFL team) were paid a total of $1,053,454.00 in bonuses, and of that total, one player received approximately $442,684.00. The average bonus paid to the twenty-four college draftees was approximately $43,894.00 and, if the one player who received $442,684.00 is excluded from the computation, the average bonus paid to the remaining twenty-three college draftees was approximately $26,800.00 per player.

10. On February 14, 1966 at a league meeting in Palm Beach, Florida, Five Smiths and the member teams reached agreement on a formula for the selection of players in the "expansion draft" and the member teams voted unanimously to authorize the Commissioner to execute a formal agreement with Five Smiths pursuant to which the expansion would be consummated.

11. Subsequent to the execution of the February 14, 1966 agreement and pursuant to its terms, the so-called expansion draft was conducted as follows:

> (a) The players made available for selection were those who were on the Active List of a member club at the close of the 1965 season or on the Reserve List of a member club as a result of injuries sustained during the 1965 season, and all players were required to be under contract to the selling team for at least the 1966 season.

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[5] Exhibit D-13; Transcript Vol. V, p. 185.

(b) From its list of forty players, each member team was allowed to protect or "freeze" twenty-nine players, leaving a pool of eleven players.

(c) Five Smiths was allowed to select one player from the pool of eleven.

(d) Each member team was then allowed to protect two additional players, leaving a pool of eight.

(e) Five Smiths was allowed to select two final players from the remaining pool of eight.

(f) Through this procedure, Five Smiths drafted three players from each of the fourteen member teams, a total of forty-two players.

12. The following facts concerning the expansion draft appear in the record:

(a) Five Smiths entered the expansion draft with approximately fifty other football players under contract. These players consisted of free agents and rookies acquired in the college draft.

(b) The forty-two players acquired in the expansion draft had a total of 149 years of prior experience in the NFL.

(c) Twenty-five of the 42 players acquired in the expansion draft were on the Falcons active roster at the beginning of the 1966 season. Of these 25, 18 were starters throughout the season and the other 7 started occasionally. Two of the 25 were injured during the year and placed on the injured reserve list. Another was released by waivers on September 21, 1966 after the season had begun and went on to play the season with another professional football team. There were 22 expansion draftees on this active roster at the end of the 1966 season.

(d) With respect to the 17 players chosen in the expansion draft but not on the Falcons' 1966 active roster at the beginning of the season, two were traded, one for another player who made the 1966 active roster. One player was placed on the injured reserve list. Four players were waived and claimed by other teams, and all four played for those teams in 1966. Three of the remaining ten were placed on Atlanta's reserve list; seven were released entirely and did not play football.

(e) Nineteen of the 42 players chosen in the expansion draft remained on the Falcons' active roster at the beginning of the 1967 season. Seventeen of the 19 were regulars throughout the season. Two of the 19 were traded during the season for other players and a draft choice.

(f) Eight of the 42 expansion draft players, remained on the Falcons' active roster throughout the 1968 season. A ninth was placed on injured reserve. Four other expansion veterans who had played the preceeding two years were traded prior to the 1968 season in exchange for one player who became a regular in 1968, one who made the active roster in 1969, and 2 draft choices. Additionally, two of the veteran players who had played for Atlanta in 1966 and 1967 spent the 1968 season playing professional football in the American Football Conference.

(g) Thirteen of the 42 veterans ultimately were traded. In exchange for the 13, the Falcons received 14 draft choices and also five players who became Falcon starters.

(h) After the 1968 season, none of the 42 expansion draft veterans reappeared on the Falcons' roster, although several players acquired in exchange for those veterans by trades or draft choices continued as members of the team.

13. The useful life of five and one-quarter years assigned to player contracts by Five Smiths was reasonably accurate under the circumstances and was a proper measure for the purpose of computing depreciation deductions.

14. With regard to televison rights, the letter of intent dated June 29, 1965 specified the following:[6]

> "Smith shall receive one-fifteenth of any sum paid by any network for any single network television contract commencing in 1966 and a pro rata share each year thereafter while Atlanta holds a franchise."

Article VIII, Paragraph (f) of the February 14, 1966 agreement specified the following:[7]

> "Smith shall be entitled to participate equally with all other member clubs in any Single Network television contract(s) hereafter executed by the League for the year 1966 and thereafter during the time the Atlanta Club continues as a member of the League."

15. While television rights were owned by the member teams individually rather than by the League, Congress had passed legislation in the early 1960's exempting the NFL and other professional sports leagues from the antitrust laws in order to allow them to bargain collectively for the sale of television rights. This pooling of television rights was of great benefit to league members and was considered a major factor in the growth of the NFL. Yearly television revenue had increased from approximately $150,000.00 per team in the early 1960's to over $1,000,000.00 per team in 1965.

16. Television income was crucial to Five Smiths. Prior to the execution of the June 29, 1965 letter of intent Mr.

[6] Stipulation Exhibit A.

[7] Stipulation Exhibit B.

Smith's counsel had been advised that a contract was being negotiated whereby Five Smiths might reasonably expect to receive approximately $1,000,000.00 per year from television. Mr. Smith's counsel testified that Mr. Smith would not have gone through with the purchase if he had not been assured of this television income.

17. In December, 1965 Commissioner Rozelle agreed to a television contract with the CBS Television Network under the terms of which CBS was granted the right to televise NFL games during the years 1966 through 1969. CBS agreed to pay the member teams of the NFL the amounts shown in the following schedule during the four-year term of the contract:

Year	*Amount*
1966	$18,800,000.00
1967	$20,050,000.00
1968	$20,300,000.00
1969	$20,050,000.00

The minimum amount of income Five Smiths could reasonably have expected to receive from the four-year CBS contract is shown in the following schedule:

Year	*Amount*
1966	$1,248,000.00
1967	$1,220,000.00
1968	$1,142,500.00
1969	$1,126,875.00
Total	$4,737,375.00

Using a prime rate of interest of five per cent, the present value on February 14, 1966, of the payments Five Smiths could reasonably have expected to receive under the terms of the four-year CBS television contract is shown in the following schedule.

Year	*Amount*
1966	$1,207,579.00
1967	$1,124,847.00
1968	$1,002,716.00
1969	$ 914,901.00
Total	$4,277,043.00

18. When the minimum present value of Five Smiths' television rights ($4,277,043.00) is subtracted from the total amount in dispute in this case ($7,722,914.02), the sum of $3,445,871.02 remains for allocation among the remaining assets acquired in the expansion agreement (*e.g.*, player contracts and the franchise). The computation is illustrated in the following chart:

TOTAL CONSIDERATION PAID BY FIVE SMITHS		$8,500,000.02
MINUS: Items not in dispute		
(a) Membership Fee	$ 50,000.00	
(b) Interest	+ $727,086.00	
	$777,086.00	-$ 777,086.00
EQUALS: Total Amount in Dispute		$7,722,914.02
MINUS: Minimum Present Value of Television Rights	$4,277,043.00	- 4,277,043.00
EQUALS: Remainder of Purchase Price Available for Allocation to Remaining Assets Acquired		$3,445,871.02

19. With regard to the useful life of Five Smiths' right to share in television contracts, both the letter of intent dated June 29, 1965 and the formal agreement dated February 14, 1966 are clear. The former stated that the rights existed "while Atlanta holds a franchise." The latter stated that the rights existed "during the time the Atlanta Club continues as a member of the League."

Since it was impossible to determine how long Atlanta would continue as a member of the league, it was impossible to determine the useful life of Five Smiths' rights to share in the league television pool. In order to find (as plaintiff contends) that Five Smiths' rights to participate in the league television pool came to an end upon the expiration of the four-year CBS contract, the court would be required to disregard the plain language of the February 14, 1966 agreement, a course which it declines to follow.

20. Texas E. Schramm, well-known and successful General Manager of the Dallas Cowboys since 1960 and one of plaintiff's expert witnesses on the question of fair market value of player contracts, testified that in his opinion the forty-two player contracts acquired by Five Smiths had a fair market value in 1966 of $7,300,000.00. Mr. Schramm arrived at his valuation by constructing a rating system based on the assumption that any veteran professional football player had a fair market value of at least $50,000.00 and that any starting player had a fair market value of $250,000.00 in 1966. Between the two extremes just described, he created a scale of valuation consisting of the following five categories:[8]

[8] Mr. Schramm described his methodology as follows:

"And so in making a judgment on these players that were sold to the Atlanta Falcons, I started on the premise that any player who was able to make a professional football team had, at least, the value of $50,000.00, because I was, and am convinced that in those times you would have been very, very pleased to have obtained a football player who you knew could make your squad for $50,000.00.

"On the other side of the ledger, I felt that any player that was a starter, that you felt confident or had past experience or a reason to believe this player was a starter, top person on the market at that time, and would have been worth $250,000. I felt that was a conservative figure.

"So I took all of these players and rated them from one to five, with one exception, the one being a player who had at least made a professional football team, and the five being a player that was a regular, would be most certainly counted upon to be a Regular, he was assigned the rating of five. I assigned $50,000.00 increments to each rating point.

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(a) Players who had at least made a professional football team were valued at $50,000.00.

(b) Fringe players who were good prospects were valued at $100,000.00.

(c) Players who had good potential but who would probably never be starters were valued at $150,000.00.

(d) Players who had played a good deal but who had not been starters were valued at $200,000.00.

(e) Starting players were valued at $250,000.00.

Mr. Schramm rated each of the forty-two players actually acquired by Five Smiths and assigned each player to one of the five categories described above, totaled the assigned values, and arrived at a total fair market value of $7,300,000.00.

Mr. Schramm corroborated his valuations by referring to the amounts other teams were paying in 1966 in order to acquire certain rookies in the first three rounds of the college draft.

21. This Court was compelled to reject the valuation of 7.3 million dollars made by witness Schramm and of 6.8

"As an example let's take a player that I rated as a number four player. This is a player who might not necessarily be a regular, was a player that participated a great deal, made a contribution, may not have been a regular because the man in front of him had superior ability, but he was a very good football player.

"And conversely, at the other end of the line, a player that was rated as a two or, we'll say in some cases a three, this was a player that would be a fringe player in the case of two, possibly, or a journeymen player, or that hadn't really done too much but was a prospect—was a good prospect. So he would fall generally in this area of two to three." Trans., Vol. II, Pp. 7-9.

million dollars made by witness Finks for the following reasons:

1) Their total figures greatly exceeded the total amount available for allocation to players' contracts, and also for value of the franchise and rights incident thereto. The amount available as shown in Finding of Fact No. 18 was $3,445,871.02.

2) While both of said experts are men of unquestioned integrity and they must have been sincere in making their estimates of valuation, this Court cannot accept valuations based on the method described by witness Schramm in Finding of Fact No. 18, in so far as it was based on a comparison of a veteran player whose record of performance in the NFL was known, with a rookie player obtained in the college draft; in many instances large sums were paid for the college draftees who, when meeting the severe tests of professional football, could not measure up to the standards required. Opinions, however, by Messrs. Schramm and Finks, together with the Falcons' first coach, Norbert Hecker, hereinafter discussed were based primarily on personal knowledge of the veteran players acquired in connection with their official duties with teams which were members of NFL.

22. The court advised counsel for both parties that, while plaintiff was entitled to a deduction for player contracts, the court could not accept plaintiff's contention that the total amount in dispute, $7,722,914.02, should be allocated to player contracts in light of the value of other assets acquired in the same transaction. Plaintiff's counsel then requested a final argument which the court allowed and which took place on February 6, 1975.

On February 5, 1975, plaintiff's counsel filed a full and comprehensive brief focusing the attention of the court primarily upon the testimony of Norbert Hecker, the first coach of the Atlanta Falcons, and arguing that the mini-

mum valuation of the forty-two player contracts which the record would support would be $3,035,000.00. A full summary here of the information concerning each of the forty-two players would unnecessarily prolong this opinion; however, the court will illustrate the general nature of the facts in the record bearing on the fair market value of individual player contracts as follows:

(1) V-1 was a twenty-three-year-old player formerly with the New York Giants who had played off and on as a regular, and had played both offense and defense. Witnesses Schramm and Finks testified that teams in the NFL would have been willing to pay $150,000.00 for the rights to V-1. Under the alternative valuation approach suggested by plaintiff's counsel in their Supplemental Post-Trial Brief, it is argued that, based on the testimony of Coach Hecker concerning the relative prospective skills of linemen acquired in the expansion draft, contract rights to V-1 would have had a minimum fair market value of $35,000.00, a figure considerably below the value attested by witnesses Schramm and Finks.

(2) V-2 had had three years experience with the Cleveland Browns where he was a starting defensive back. Mr. Schramm testified that V-2 had proven his ability to perform as a starter in the NFL and that, in his opinion, teams in the NFL would have been willing to pay $250,000.00 for the rights to V-2. Mr. Finks testified that V-2's contracts had a fair market value in February, 1966 of at least $200,000.00.

Under the alternative valuation approach suggested in plaintiff's Supplemental Post-Trial Brief, it is contended that the rights to V-2 had a fair market value of at least $140,000.00.

The testimony in the record as to the remaining forty veteran players follows in a general way the testimony concerning V-1 and V-2 summarized above. For a more

complete discussion of each of the veteran players, see Plaintiff's Post-Trial Brief (Appendix) filed December 31, 1974, and Plaintiff's Supplemental Post-Trial Brief filed February 5, 1975.

23. After reviewing all the evidence in the record, the court is persuaded that the testimony of Norbert Hecker analyzing the veteran players and comparing them among themselves and to various college rookies, the evidence demonstrating the cash value of college rookies comparable in ability to the veteran chosen by Five Smiths, and the valuations of plaintiff's expert witnesses discounted to a degree, all prove with reasonably certainty that on February 14, 1966 under the circumstances then prevailing in professional football, the contract rights to the forty-two veteran players purchased by Five Smiths had a total fair market value of $3,035,000.00. That amount lies within the range of values allowable as depreciable intangible assets, is supported by persuasive evidence, and is reasonable.

Conclusions of Law

1. The Internal Revenue Code allows as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear of property used in a trade or business or held for the production of income. Int. Rev. Code of 1954, § 167(a). The purpose for which the deduction is allowed is "to approximate and reflect the financial consequences to the taxpayer of the subtle effects of time and use on the value of his capital assets." *Detroit Edison Co. v. Commissioner,* 319 U.S. 98, 101 (1942).

2. Depreciation deductions are not limited to tangible assets but can also include intangible assets. *Griswold* v. *Commisisoner,* 400 F.2d 427 (5th Cir. 1968). Depreciation of intangible capital assets is specifically provided for in Treas. Reg. § 1.167(a)-3 (1956):

> If an intangible asset is known from experience or other factors to be of use in the business or in the pro-

duction of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to goodwill.

3. In a proper case, a professional football player employment contract may be the subject of a depreciation deduction. Rev. Rul. 71-137, 1971-1 Com. Bull. 227. The IRS has ruled that the acquisition cost of such a contract must be depreciated over the useful life of the player. *Id.* While it is true that Rev. Rul. 71-137 was not in existence at the time of the acquisition in this case, Rev. Rul. 54-441, 1954-1 Cum. Bull. 101, a similar ruling dealing with the depreciation of baseball player contracts, did exist and that ruling supported the conclusion that such contracts were depreciable assets.

4. It is axiomatic however that before depreciation can be computed, the proper basis for depreciation must be established. *Cf. St. Louis County Water Co. v. United States,* 452 F.2d 1022, 1029 (Ct. Cl. 1971); 4 Mertens, Law of Federal Income Taxation, § 23.19. The usual measure of a taxpayer's base for depreciation is the amount of his capital investment in the property less certain adjustments for salvage or resale value. Int. Rev. Code of 1954, §§ 167 (f), 167(g), 1011 and 1012. In accordance with the general rule, the IRS has ruled that the proper base for computing depreciation of a professional football player contract is the acquisition cost of the contract; *i.e.,* amounts paid or incurred upon the purchase of a player contract, and bonuses paid to players for signing player contracts. Rev. Rul. 71-137, 1971-1 Cum. Bull. 227.

5. The rule that in a proper case the court can look beyond the formal dealings of the parties to determine where the forms reflect meaningful substance is elementary in the law of taxation. *Schulz* v. *Commissioner,* 294 F.2d 52 (9th Cir. 1961). As the Supreme Court stated in *Commissioner* v. *Court Holding Co.,* 324 U.S. 331, 334 (1945):

> "The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title. To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress."

Furthermore, as the Supreme Court stated in *Higgins* v. *Smith,* 308 U.S. 473, 477-478 (1940):

> "The Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. To hold otherwise would permit the schemes of taxpayers to supersede legislation in the determination of the time and manner of taxation."

The court must look beyond the forms chosen by the parties and determine the tax consequences of the trans-

action based on the economic realities of the challenged tax event.

The court rejects plaintiff's contention that, for the purpose of the sale of a franchise, player contracts, television rights and other related assets to the purchaser of a NFL expansion team, the NFL on the one hand and its fourteen member teams on the other must be considered to have been separate entities selling separate assets to a common purchaser. But even if the NFL and its member teams could be considered to have been separate entities selling separate assets to a common purchaser and the sum of $7,722,914.02 could be considered to have been the purchase price on only those asets acquired directly from the member teams as opposed to the NFL, the allocation of the entire amount of the purchase price to player contracts and nothing to the extraordinarily valuable television rights which also were owned by and acquired from the member teams in the same transaction would still be erroneous and the court would be justified in disregarding it on the grounds that the allocation failed to comport with economic reality.

Furthermore, Five Smiths right to participate in the league television pool was a nondepreciable asset[9] and, where a taxpayer acquires "a combination of depreciable and nondepreciable property for a lump sum, as for example, buildings and land, the basis for depreciation cannot exceed an amount which bears the same proportion to the lump sum as the value of the depreciable property at the time of acquisition bears to the value of the entire property at that time." Treas. Regs. § 1.167(a)-5 (1956). The court has found that the television rights had a minimum present value of $4,277,043.00 on February 14, 1966. Under the terms of Treas. Regs. § 1.67(a)-5, that sum, which is definite but not depreciable, would operate to reduce the por-

[9] *See* Conclusion of Law No. 6, *infra*.

tion of the total consideration which could reasonably be allocated to player contracts.

6. In order to qualify for a depreciation deduction, an intangible asset must have a limited useful life the duration of which can be ascertained with reasonable accuracy. *Houston Chronicle Pub. Co. v. United States,* 481 F.2d 1240 (5th Cir. 1973); *Pohlen* v. *Commissioner,* 165 F.2d 258 (5th Cir. 1948); Treas. Reg. § 1.167 (a)-3.

Because Five Smiths right to participate equally with the other member clubs in television contracts during the time Five Smiths maintained its membership in the NFL had no definite limited useful life in the duration of which could be ascertained with reasonable accuracy, the court concludes that the asset was not the proper subject of depreciation deductions.

7. It is clear that the court is not bound by the opinion testimony of an expert witness. In *Logan Lumber Co. v. Commissioner,* 365 F.2d 846, 852-853 (5th Cir. 1966), a case in which plaintiff taxpayer's expert witnesses were uncontroverted, the court stated:

> "We think the rule is clear, the Tax Court is not bound by the conclusory statements of any witness, even an 'expert'. The Court must look at the substance of a witness' testimony as well as his conclusions. The testimony must be weighed along with all other relevant evidence."

See *South Texas Rice Warehouse v. Commissioner,* 366 F.2d 890, 898 (5th Cir. 1966), *cert. denied,* 386 U.S. 1016 (1967); *Buford-Toothaker Tractor Co. v. Commissioner,* 192 F.2d 633, 635 (5th Cir. 1951). It is the duty of the trial court to weigh the evidence and draw inferences therefrom.

Therefore, even though the testimony of plaintiff's expert witnesses was largely uncontroverted, the court must weigh that testimony along with all the other evidence in

the record and is not required to accept as binding the conclusions of any expert.

8. The taxpayer bears the burden of proving his right to claim a depreciation deduction and the amount of the deduction to which he is entitled. *Houston Chronicle Pub. Co. v. United States,* 481 F.2d 1240 (5th Cir. 1973); *David v. Phinney,* 350 F.2d (5th Cir. 1965), *cert. denied,* 382 U.S. 983 (1966); *Reading Radio Inc.* v. *United States,* 299 F. Supp. 616, 617 (D.N.H. 1969).

For the reasons stated in the foregoing Findings of Fact and Conclusions of Law, the court holds that the plaintiff has failed to carry his burden of proving by a preponderance of the credible evidence that the total sum of $7,722,914.02 claimed by Five Smiths as the basis for depreciation of forty-two veteran professional football player employment contracts reflected with reasonable accuracy the acquisition costs of the contracts when viewed in accordance with the principles of economic reality.

While, on the one hand, plaintiff has failed to establish his right to the claimed deductions in the total amount sought, on the other hand, the court does not accept the Government's contention that it is impossible to establish, except in an arbitrary manner, a reasonably accurate basis for depreciation of the veteran player contracts acquired by Five Smiths in February 1966. The Government has conceded that the veteran player contracts were valuable assets. While it is true that in this case the task of proving the fair market value of the contracts was fraught with difficulties, the court can not hold that it was impossible, either as a legal or factual matter, to allocate with reasonable accuracy some portion of the total consideration paid by Five Smiths to the purchase price the forty-two veteran player contracts.[10]

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[10] As stated in the case of *ARC Realty Co. v. Commissioner,* 295 F.2d 98, 103 (8 Cir. 1961):

> As the Court of Appeals for the Fifth Circuit observed in *Anderson v. Commissioner,* 250 F.2d 242, 249 (5th Cir. 1957), *cert. denied,* 356 U.S. 950 (1958):
>
> > "Valuation . . . is necessarily an approximation . . . It is not necessary that the value arrived at by the trial court be a figure as to which there is specific testimony, if it is within the range of figures that may properly be deduced from the evidence."
>
> And as the Court of Appeals for the Third Circuit stated in *Commissioner v. Thompson,* 222 F.2d 893, 895 (3rd Cir. 1955):
>
> > "Although . . . the problem of valuation is difficult, it is not insuperable. It is the function of the trier of fact to weigh all the elements properly considered in the valuation and to translate them into dollars and cents. If there is speculation in this, it is a product of the nature of the problem, but not a reason for abdication of the judicial function, which in the administration of justice, is frequently called upon to appraise intangibles."
>
> Valuation is, under the best of circumstances, a difficult task because the fair market value of any asset may depend upon, or at least be influenced by, a large number of factors or variables which may be difficult both to identify and to evaluate. But when the asset to be valued is the employment contracts of a group of forty-two professional football players, the task of arriving at a reasonably ac-

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> "To give a detailed resume and analysis of the facts for the purpose of demonstrating that the instant determination is invulnerable to a successful attack would unduly and unnecessarily prolong this opinion". It is further stated that fixing the fair value of corporate stock "obviously cannot be accomplished with exactness or complete accuracy."
> *Id.*

curate result is unusually arduous. The court must evaluate (as best it can) all the evidence in the record and arrive at the most reasonable result possible under the circumstances, fully realizing that such a result may necessarily be imprecise.

On the basis of the foregoing Findings of Fact and Conclusions of Law, the court is persuaded that there is sufficient evidence in the record to support the conclusion that the forty-two veteran player contracts acquired by Five Smiths may be valued with reasonable accuracy at $3,035,000.00 for the purposes of computing the depreciation deductions which are the subject of this litigation.

9. Plaintiffs shall be entitled to claim depreciation deductions for forty-two veteran player contracts based upon a value of $3,035,000.00 and a useful life of 5.25 years.

10. The following chart summarizes the Findings and Conclusions of this court with regard to the allocation of the total amount of consideration paid by Five Smiths in the February 14, 1966 expansion agreement.

TOTAL CONSIDERATION PAID BY FIVE SMITHS		$8,500,000.02
MINUS: Items not in dispute		
(a) Membership Fee	$ 50,000.00	
(b) Interest	+$ 727,086.00	
	$ 777,086.00	-$ 777,086.00
EQUALS: Total Amount in Dispute		$7,722,914.02
MINUS: Minimum Present Value of Television Rights	$4,277,043.00	-$4,277,043.00
EQUALS: Remainder of Purchase Price Available for Allocation to Remaining Assets Acquired		$3,445,871.02
MINUS: Amount Allocated to Player Contracts	$3,035,000.00	-$3,035,000.00
EQUALS: Remainder to Be Allocated to the Franchise		$ 410,871.02